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United States

Circuit Court of Appeals

For the Ninth Circuit.

DAVID C. NORCROSS,

Appellant,

vs.

THE UNITED STATES OF AMERICA,

Appellee.


In the Matter of the Application of DAVID C.
NORCROSS for a Writ of Habeas Corpus.

Transcript of Record.

Upon Appeal from the United States District Court
for the Northern District of California,
First Division.

FILED

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No 2328

United States

Circuit Court of Appeals

U. S. District Court

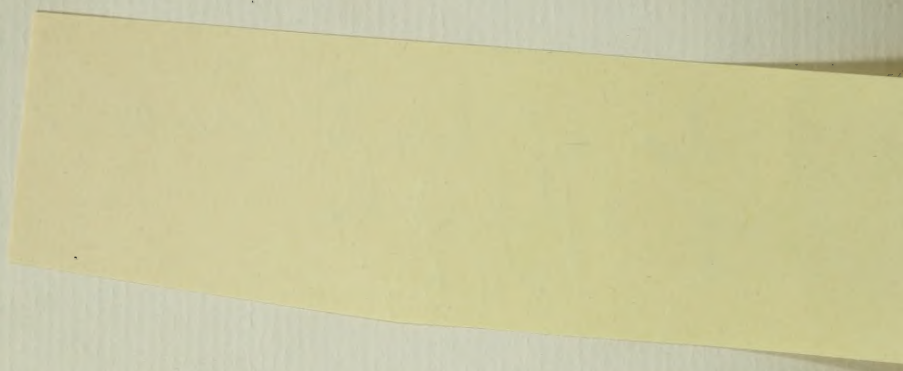
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Record of U. S. Circuit
Court of appeals
846

Transcript of Record

Open Appeal from the U. S. District Court
for the Southern District of California
File 100000



No. 2329

United States
Circuit Court of Appeals

For the Ninth Circuit.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur. Title heads inserted by the Clerk are enclosed within brackets.]

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UNITED STATES OF AMERICA.

District Court of the United States, Northern District of California, First Division.

CLERK'S OFFICE.

No. 15,462.

In the Matter of the Application of DAVID C.
NORCROSS for Writ of Habeas Corpus.

Praecipe [for Copy of Record].

To the Clerk of Said Court:

Sir: Please issue copy of record herein as follows:
Application for writ with exhibits attached thereto;
Order denying same;
Appeal from order;
Order allowing appeal and fixing amount of bail;
Assignment of errors;
Citation on appeal;
Cost bond on appeal;
Admission of receipt of papers.

SAMUEL KNIGHT,
Attorney for Appellant.

4 Oct./13.

[Endorsed]: Filed Oct. 6, 1913. W. B. Maling,
Clerk. By C. W. Calbreath, Deputy Clerk. [1*]

*Page-number appearing at foot of page of original certified Record.

*In the District Court of the United States, in and for
the Northern District of California, First Division.*

In the Matter of Application of DAVID C. NORCROSS for Writ of Habeas Corpus.

Petition for Writ of Habeas Corpus.

To the District Court of the United States in and for
the Northern District of California, First Division:

The petition of David C. Norcross respectfully
shows:

I.

That your petitioner is a citizen of the United States, and inhabitant and citizen of the State of California, and a resident of the City and County of San Francisco, State of California, in this district.

II.

That your petitioner is now, and for several years last past has been, continuously, Secretary of Western Fuel Company, a corporation duly organized, created and existing under and by virtue of the laws of the State of California.

III.

That your petitioner is now actually imprisoned and restrained of his liberty and detained by color of the authority of the United States in the custody of C. T. Elliott, Esq., U. S. Marshal in and for said Northern District of California, to wit: At the said City and County of San Francisco, State of California, in said district. [2]

IV.

That the sole claim or authority by virtue of which said C. T. Elliott, Esq., Marshal, as aforesaid, so restrains and detains your petitioner is a certain commitment in writing, a copy of which is hereto annexed, marked Exhibit "A," and made a part hereof.

V.

That said commitment was issued pursuant to an order of this Court made and entered at a stated term thereof held in the United States Courthouse and Postoffice Building, on the corner of Mission and Seventh Streets, in said City and County of San Francisco, on the 5th day of September, 1913, a copy of which said order is hereto attached, marked Exhibit "B," and made a part hereof.

VI.

That said last mentioned order was made and based solely and exclusively upon a certain *subpoena duces tecum* hereinafter referred to and upon two certain presentments or reports made by the Grand Jury of the United States within and for said Northern District of California. The first of said presentments or reports, a copy of which is hereto attached, marked Exhibit "C" and made a part hereof, was and is in writing and was made to and filed in said District Court of the United States in and for the said Northern District of California, First Division, on the 14th day of August, 1913. On this presentment or report a citation, a copy of which is also hereto attached, marked Exhibit "D," and made a part hereof, was issued out of and under the seal of said Court by the

Clerk thereof, and served upon your petitioner on the 16th day of August, 1913. After a hearing upon this citation, a copy of the record whereof is hereto attached, marked Exhibit "L," and made a part hereof, said District Court made and caused to be entered its certain order on the 3d day of September, 1913, requiring your petitioner to produce before said Grand Jury the books, papers and other documents mentioned in said *subpoena duces tecum*, a copy of which order is hereto attached, marked Exhibit "E," and made a part hereof. [3]

VII.

That after the hearing last aforesaid, and after your petitioner had further declined to produce before said Grand Jury the said books, papers and other documents referred to in said *subpoena duces tecum*, and after said Grand Jury had made orally a further presentment or report to said District Court on the said 5th day of September, 1913, stating that your petitioner had further declined to produce before said Grand Jury any of these books, papers or other documents, a further order was made by said District Court and served upon your petitioner upon the said 5th day of September, 1913, citing him to show cause on said day why he should not be adjudged guilty of contempt of said Court therefor, a copy of which order is attached hereto, marked Exhibit "F," and made a part hereof. Upon the hearing of the order last mentioned it was stipulated and agreed by and between counsel for the United States and for your petitioner that all of the records hereof and all of the proceedings, including the evidence and

stipulations as to evidence, heretofore had, taken and entered into herein (which said evidence and stipulations with reference thereto are hereinbefore referred to as Exhibit "L"), should be and the same were admitted in and deemed as evidence upon behalf of your petitioner upon said hearing. Thereupon, after arguments of counsel, said District Court made and caused to be entered its order hereinbefore referred to as Exhibit "B," adjudging your petitioner to be in contempt of said Court and directing his imprisonment in the County jail of Alameda County as in said order provided.

VIII.

That the only subpoena, or *subpoena duces tecum*, under [4] which your petitioner appeared before said Grand Jury, and pursuant to which he was interrogated before said Grand Jury, and which is referred to in said presentments or reports of said Grand Jury, was one issued by and under the seal of the Clerk of said District Court of the United States in and for said Northern District of California, Division No. 1, and served upon your petitioner at or about eleven o'clock in the forenoon of the 14th day of August, 1913, a copy of which said subpoena is hereto annexed, marked Exhibit "G," and made a part hereof.

IX.

That theretofore three certain indictments had been presented to said District Court of the United States in and for said Northern District of California, First Division, by the United States Grand Jury then sitting therein, against John L. Howard,

James B. Smith, J. L. Schmitt, Robert Bruce, Sidney V. Smith, F. C. Mills, E. H. Mayer and Edward J. Smith all of whom are and were officers or employees, respectively, of said Western Fuel Company, two of said indictments having been presented to and filed in said Court in the November, 1912, term of said Court; the other one of said indictments having been presented to and filed in said Court during the March, 1913, term of said Court, copies of which said indictments are hereto annexed marked Exhibits "H," "I" and "K," respectively, and made a part hereof.

That the trial of the defendants therein named, and each of them, under one of said indictments, had been heretofore set for hearing in and by said Court, and thereafter respectively postponed from time to time, and the trial of said defendants, and each of them had been on said 14th day of August, 1913, and at the time your petitioner attended before said Grand Jury as a witness [5] as aforesaid, set for hearing on the 26th day of August, 1913, but at the time last aforesaid, said trial was further postponed until the 13th day of October, 1913.

X.

That at all the times herein mentioned after said indictments had been presented and filed, and particularly on the said 14th day of August, 1913, and thereafter, there was pending before said Grand Jury no cause, proceeding or investigation whatsoever either upon its own initiation or upon presentment to it by or on behalf of the United States, against any person, firm, association or corporation whatsoever, wherein the books, papers and other

documents, or any of them, mentioned in said *subpoena duces tecum* were relevant or material or in any manner connected or to which they in any manner referred; nor was there at any of such times any cause, proceeding or investigation whatsoever pending before said Grand Jury in any manner relating to the importation or sale of coal at the port of San Francisco, or elsewhere, or involving the perpetration of alleged fraud against the United States in connection therewith, or against these defendants or any of them.

XI.

That the said *subpoena duces tecum* hereinbefore set forth, as aforesaid, was so served upon your petitioner as aforesaid, and he was thereby requested to produce the books, papers and other documents therein mentioned merely for the purpose of enabling the United States and the prosecuting officers thereof, to go on a fishing expedition, and, by the use of said Grand Jury in the manner hereinabove stated, to obtain said books, papers and documents solely for the purpose of enabling said United States to obtain evidence at the trial of the case hereinbefore mentioned in paragraph IX hereof, and, if possible, to strengthen said [6] case for the prosecution thereof, and to endeavor, if possible, to find something in said books, papers and documents which might be used by said United States upon said trial, and not otherwise.

XII.

That said Western Fuel Company relies upon and daily uses in the conduct of its business, the books,

papers and other documents mentioned in said *subpoena duces tecum*, and has done so during all of the times herein stated, and its officers and employees who are now under indictment as aforesaid, use and have been for the past several months continuously using said books, papers and other documents in the preparation of their defense in the trial hereinbefore referred to. Furthermore, said books, papers and other documents constitute at least two large dray loads, and are of great bulk and quantity, covering a period of over seven years of great business activity of said Western Fuel Company.

XIII.

That your petitioner's imprisonment, restraint and detention are and each of them is without authority of law whatsoever, and are and is in violation of his rights, privileges and immunities under the constitution and laws of the United States, for the following reasons:

(a) Said District Court of the United States, in and for the Northern District of California, Division No. 1, was without jurisdiction under the said constitution and laws by reason of any of the matters or things contained and set forth in said presentments or reports of the Grand Jury to entertain any charge or charges of contempt against your petitioner, or to act or proceed in any manner in the premises.

(b) At the time your petitioner attended before said Grand Jury and was there examined as a witness, there was no cause [7] or action of any kind whatsoever pending before said Grand Jury between

the United States and said Western Fuel Company, or any of its officers, agents or employees, or between the United States and any other persons, parties or corporations, nor was there any cause or proceeding or investigation whatsoever then pending before said Grand Jury either upon its own initiation or upon presentment to it by or on behalf of the United States against any person, firm, association or corporation whatsoever in which cause, proceeding, or investigation your petitioner could be required under the said constitution and laws to testify or give evidence or produce any books, papers, documents or other things whatsoever before said Grand Jury, or in which said books, papers, documents and other things, or any of them, or any testimony which your petitioner could give, were or was material or relevant whatsoever.

(c) Said Grand Jury was not in the exercise of its proper and legitimate authority in prosecuting the alleged investigation set out in said presentments or reports, the powers of the Federal Grand Jury being limited under said constitution to the investigation either of specific charges against particular persons, or specific charges against persons then unknown, or charges against specific persons, and which said charges and persons, or charges or persons, respectively, are then and there under investigation by said Grand Jury, and there being under investigation by said Grand Jury at the time your petitioner attended before them as aforesaid, no specific or other charge against any particular person, and no specific or other charge against any person then unknown to

said Grand Jury, and no charge against any specific or other person, and there being then and there no presentment, indictment, or other charge, formal or informal, written or oral, pending [8] against any person, firm, association, or corporation before said Grand Jury either initiated by said Grand Jury of its own knowledge, or upon information obtained by it, or upon the knowledge or information obtained by any of its members, or instituted by the United States, or by anyone acting upon its behalf. Nor at such time did it appear to said Grand Jury that there was reason to believe that a crime had been committed for which said Grand Jury had not presented an indictment against any and all persons alleged to have committed said crime, or to have been connected therewith; and consequently said *subpoena duces tecum* and the requirement of said Grand Jury that your petitioner should appear before it and testify and produce documentary evidence, and said presentments, citation and orders based thereon were *coram non judice* and void.

(d) Your petitioner, at the time he attended before said Grand Jury and was examined as aforesaid, was not apprised of the name or names of any party with respect to whom he was being called to testify and to produce the books, papers and other documents aforesaid, nor was he informed of the nature of the or any charge pending against any person, firm, association or corporation whatsoever, nor was he advised that any cause, proceeding or investigation whatsoever was pending before said Grand Jury at such time against any party whatsoever; but, on

the contrary, petitioner alleges that he and his counsel were informed by officers of the Government, including the special agent of the Treasury Department, who was then in charge of the collection and acquisition of evidence in the case hereinbefore referred to, and by special counsel employed by the United States to prosecute said case, and your petitioner thereupon verily believed and believes that at the time of your petitioner's appearance as witness before said Grand Jury as aforesaid, there was no charge, cause, proceeding or investigation of any kind or nature whatsoever then pending before said Grand [9] Jury against any person, firm, association or corporation whatsoever.

(e) The subpoena under which your petitioner has been adjudged in contempt, a copy of which is hereinbefore set forth, does not specify that any charge, cause, action or proceeding was pending before said Grand Jury, and does not in any manner apprise your petitioner that there was any such charge, cause, action or proceeding pending before said Grand Jury either of any character whatever, or against any person, firm, association or corporation whatsoever.

(f) There was no order made by, nor application for any orders made to, any judge of said District Court, or other Judge, nor was there any other order or application therefor providing or requesting the issuance of said or any *subpoena duces tecum*, and the *subpoena duces tecum*, a copy of which is hereinbefore set forth, was issued by the clerk of said United States District Court in and for the Northern

District of California, Division No. 1, without any order or direction of any judge whatsoever, nor was there any showing made, either to any Judge or to said clerk, that the papers, books and documents, or any of them, described in said *subpoena duces tecum* were material and relevant, or material or relevant to any matter, cause or proceeding before said Grand Jury whatsoever.

(g) The said *subpoena duces tecum* and said presentments, citation and order directing your petitioner to produce the books, papers and documents called for by said *subpoena duces tecum*, or otherwise suffer punishment, and said order adjudging your petitioner in contempt, and all other process and proceedings heretofore served and had herein, were, and each of them was, made and had in violation of your petitioner's right under the fourth amendment to the constitution of the United States providing that the right of the people to be secure in their person, houses, papers and books against unreasonable searches and seizures shall not be violated.

(h) The said *subpoena duces tecum* and said presentments, [10] citation and orders directing your petitioner to produce the books, papers and documents called for by *subpoena duces tecum*, or otherwise suffer punishment, and said order adjudging your petitioner in contempt, and said commitment, were, and each of them was, and is, in effect a warrant and search for and seizure of the papers mentioned in said *subpoena duces tecum*, and not being issued upon probable cause, or supported by oath or affirmation, and failing to particularly describe

the place to be searched or the things to be seized, constituted and constitute a violation of said fourth amendment.

(i) The said *subpoena duces tecum* and said presentments, citation and orders directing your petitioner to produce the books, papers and documents called for by *subpoena duces tecum*, or otherwise suffer punishment, and said order adjudging your petitioner in contempt, and commitment issued thereunder, constituted and constitute a violation of said fourth amendment to said constitution by reason of the failure to particularly describe the books, papers and documents sought to be produced, and by reason of the fact that they are needed daily by said Western Fuel Company in the conduct of its business, and are so numerous as to make it difficult to carry the same to the room of said Grand Jury, and by reason of the fact that their presence before said Grand Jury will embarrass said defendants, and each of them, in the preparation of their defense on the trial of said cause, who require said books, papers and other documents for the purpose of obtaining information necessary to properly meet the charges against them contained in said indictments and in said cause now set for trial.

(j) The books, papers and other documents mentioned in said *subpoena duces tecum* being the property of said Western Fuel Company, and in your petitioner's custody solely by reason of his official relation toward that company, as aforesaid, the compulsion of said subpoena and of said orders that he produce said books, papers and other documents thereunder, would, if effective, amount to an unrea-

sonable search for and seizure of the papers and books [11] of said corporation in violation of its rights under said fourth amendment, which it was your petitioner's duty, as such officer and custodian, to protect by lawful means, as he respectfully submits he is now doing.

(k) The production of said books, papers and other documents being required of your petitioner in his capacity as an officer of said corporation, and said citation, *subpoena duces tecum* and orders so requiring it not being issued upon probable cause, or supported by oath or affirmation, and failing to particularly describe the place to be searched, or the things to be seized, constitutes a violation of said fourth amendment; consequently, not only was your petitioner under no immediate obligation to enforce or obey the same, but his duty as such officer required him to disregard it.

XIV.

Your petitioner is advised by counsel, and verily believes, that for the reasons above stated said order adjudging him guilty of contempt and his commitment, pursuant to such order, to the custody of said marshal, were, and each of them was, without legal right, authority or justification of any kind and are, and each of them is, utterly void and ineffectual, and that his detention and imprisonment thereunder are in violation of said constitution and the laws of the United States, and in violation of his rights, privileges and immunities thereunder.

WHEREFORE, your petitioner prays that a writ of *habeas corpus* may issue directed to said C. T.

Elliott, Esq., Marshal, as aforesaid, or to any of his deputies, requiring him, or them to bring and have your petitioner before this Court at a time to be by it determined together with the true cause of his detention, to the end that due inquiry may be had in the premises; and that, furthermore, this Court may proceed in a summary way to determine the facts of the case in that regard, and the legality of your petitioner's imprisonment, restraint and detention, [12] and thereupon to dispose of your petitioner as law and justice may require.

And your petitioner will ever pray.

Dated at San Francisco, California, the tenth day of September, 1913.

SAMUEL KNIGHT,
STANLEY MOORE,

Attorneys for Petitioner. [13]

United States of America,
State and Northern District of California,—ss.

David C. Norcross, being first duly sworn, deposes and says:

That he is the petitioner above named; that he has read the foregoing petition and knows the contents thereof; that the same is true of his own knowledge, except as to the matters that are therein stated on information or belief, and that as to those matters he believes it to be true.

DAVID C. NORCROSS.

Subscribed and sworn to before me this 10th day of September, 1913.

[Seal]

W. B. MALING,
Clerk of U. S. District Court, Northern District of
California. [14]

**Exhibit "A" [Commitment of D. C. Norcross to
County Jail].**

United States of America,
Northern District of California,—ss.

The President of the United States of America, To
the Marshal of the United States of America,
for the Northern District of California, Greet-
ing:

Whereas, at the July Term of the District Court
of the United States of America for the Northern
District of California, held at the courtroom of said
court, in the City and County of San Francisco, in
said District, to wit, on the 5th day of September,
A. D. 1913.

D. C. Norcross was adjudged guilty of contempt
of Court, in failing to obey a subpoena issued out of
this Court on August 14th, 1913, and for failure to
obey an order of this Court, dated September 3d,
1913, committed at

and within the jurisdiction of said Court, contrary
to the form of the Statutes of the United States in
such case made and provided, and against the peace
and dignity of the said United States.

And whereas, on the 5th day of September, A. D.
1913, being a day in said term of said Court, said D.
C. NORCROSS was, for the offense of which he
stood convicted as aforesaid, by the judgment of

said Court ordered imprisoned in the County Jail of Alameda County, State of California, until he obeys said subpoena and said Order of Court.

And it was further ordered that said term of imprisonment be executed upon the said D. C. NORCROSS until the other or further order of the Court, by imprisonment in the County Jail of Alameda County, State of California. [15]

Now this is to Command you, the said Marshal, to take and keep and safely deliver the said D. C. NORCROSS into the custody of the Keeper or Warden and other officers in charge of the said Alameda County Jail.

And this is to command you, the said Keeper or Warden and other officers in charge of said Alameda County Jail, to receive from the Marshal of the United States, for the said Northern District of California, the said D. C. NORCROSS, convicted and sentenced as aforesaid, and him the said D. C. NORCROSS keep and imprison until he obeys said subpoena and Order, or until the other or further Order of the Court.

HEREIN FAIL NOT.

Witness, the Honorable M. T. DOOLING, Judge of the District Court of the United States for the Northern District of California, and the Seal thereof, at San Francisco, in said District on the 5th day of September, A. D. 1913.

[Seal]

W. B. MALING,
Clerk of said District Court.

By Lyle S. Morris,
Deputy Clerk.

NOTE—The Court this day Ordered a stay of the execution of the foregoing Commitment until 12 o'clock noon of the 10th day of September, A. D. 1913.

Attest: September 5th, 1913.

W. B. MALING,
Clerk.

By Lyle S. Morris,
Deputy Clerk.

I, W. B. Maling, Clerk of the District Court of the United States for the Northern District of California, do hereby certify the foregoing to be a full, true and correct copy of the Original Commitment issued in the case of The United States vs. D. C. Norcross.

Attest: my hand and the Seal of said District Court, this 10th day of September.

W. B. MALING,
Clerk.

By _____,
Deputy Clerk. [16]

Exhibit "B" [Judgment].

UNITED STATES OF AMERICA, NORTHERN
DISTRICT OF CALIFORNIA.

*In the District Court of the United States, for the
Northern District of California.*

In the Matter of the Presentment Heretofore Returned by the Grand Jury Against D. C. NORCROSS as Secretary of the WESTERN FUEL COMPANY, a Corporation, for Contempt of the Above-entitled Court.

It appearing to the Court that on the 14th day of August, 1913, a *subpoena duces tecum* in proper form was duly issued out of and under the seal of the above-entitled court, directed to D. C. Norcross, as Secretary of the Western Fuel Company, a corporation, requiring and commanding said D. C. Norcross as Secretary of the Western Fuel Company, a corporation, to appear before the Grand Jury of the United States of America within and for the Northern District of California at a session of said Grand Jury to be held in the United States Courthouse situate in the Postoffice Building in the City and County of San Francisco, State of California, on the 14th day of August, 1913, at two o'clock in the afternoon of said day, and requiring said D. C. Norcross as Secretary of the Western Fuel Company at said time and place to produce certain books, papers, records, vouchers and documents specifically described [17] in said subpoena; that thereafter and on the said 14th day of August, 1913, at said City and County of San Francisco, in said State and Northern District of California, said subpoena was duly served upon said D. C. Norcross as Secretary of the Western Fuel Company, a corporation, by a Deputy United States Marshal in and for the Northern District of California by said Deputy United States Marshal then and there delivering to and leaving with D. C. Norcross, as Secretary of the Western Fuel Company, a corporation, a true and correct copy of said *subpoena duces tecum* and at the same time showing him the original thereof; that thereafter and at the time and place designated in

said subpoena, to wit, at two o'clock in the afternoon of said 14th day of August, 1913, in said Post-office Building, in said City and County of San Francisco, State of California, and in pursuance of said subpoena, said D. C. Norcross, as Secretary of said Western Fuel Company, a corporation, appeared before said Grand Jury and was then and there being duly held by said Grand Jury and was then and there duly sworn by the foreman of said Grand Jury to testify as a witness in an investigation then being pursued by said Grand Jury concerning certain frauds alleged to have been perpetrated against the United States; that said D. C. Norcross, as Secretary of the Western Fuel Company, a corporation, refused to produce before said Grand Jury at said time and place and during said session or during any other session of said Grand Jury any of the books, papers, records, vouchers or documents described or referred to in said subpoena; and during said session of said Grand Jury said D. C. Norcross, as Secretary of the Western Fuel Company, a corporation, informed said Grand Jury and the members thereof that he would not, in obedience to said subpoena, produce said books, papers, records, vouchers and documents or any of them; and it further appearing to the Court that said D. C. Norcross, as Secretary of the Western Fuel Company, a corporation, at all of [18] said times had and still has possession, custody and control of all of said books, papers, records, vouchers and documents referred to and described in said subpoena, excepting certain of said records in ex-

istence prior to the 18th day of April, 1906, and destroyed on said date, and that he refuses to and will not produce before said Grand Jury at any session to be held thereof, in obedience to said subpoena so duly served upon him or any other subpoena, said books, papers, records, vouchers and documents, or any of them; and it further appearing to the Court that on the 14th day of August, 1913, said Grand Jury returned into this court and filed with the clerk thereof a presentment against said D. C. Norcross, as Secretary of the Western Fuel Company, a corporation, in which the facts above set forth were found by said Grand Jury, and said Grand Jury requested that said D. C. Norcross, as Secretary of the Western Fuel Company, a corporation, be brought before this Court and be dealt with according to law; that upon the return and filing of said presentment the above-entitled Court duly gave and made its order directing said D. C. Norcross, as Secretary of the Western Fuel Company, a corporation, to show cause before the First Division of the District Court of the United States for the Northern District of California at a session to be held in the courtroom of said court in said Postoffice Building in the City and County of San Francisco, State of California, on Monday, the 18th day of August, 1913, at the hour of ten o'clock A. M. of said day, why he should not be adjudged guilty of contempt of this Court and punished for said contempt in refusing said subpoena and to produce before said Grand Jury said books, papers, records, vouchers and documents or any of them, so in his possession and under his con-

trol; that on said 18th day of August, 1913, at the time and place specified in said order said D. C. Norcross, as Secretary of the Western Fuel Company, a corporation, appeared before this Court in response to said presentment and order of said Court; and that [19] at said time and place a hearing was had upon said presentment and said order evidence was introduced in relation thereto, and the said proceedings was submitted to the Court for its consideration and decision.

And it further appearing to the Court that on the 3d day of September, 1913, the above-entitled Court in the above-entitled proceedings duly gave and made its order directing said D. C. Norcross, as Secretary of the Western Fuel Company, a corporation, to produce before said Grand Jury at a session to be held of said Grand Jury at two o'clock P. M. on the 4th day of September, 1913, in said Postoffice Building in the said City and County of San Francisco, State of California, said books, papers, records, vouchers and documents described and referred to in said subpoena and so in his possession and under his control; that thereafter and on said 3d day of September, 1913, a true and correct copy of said order, duly certified by the clerk of the above-entitled court was duly served by the United States Marshal in and for the Northern District of California upon said D. C. Norcross, as Secretary of the Western Fuel Company, a corporation, by said United States Marshal then and there delivering to and leaving with said D. C. Norcross, as the Secretary of said Western Fuel Company, a corporation,

said true and correct copy of said order.

And it further appearing to the Court that a session of said Grand Jury of the United States of America within and for the Northern District of California was duly held in said Postoffice Building at said City and County of San Francisco, State of California, at two o'clock P. M. on said 4th day of September, 1913, said session so being held at the time and place specified in said order, and that said D. C. Norcross, as Secretary of the Western Fuel Company, a corporation, failed, neglected and refused to appear before said Grand Jury at said session or to produce said books, [20] papers, records, vouchers and documents or any of them so in his possession and under his control.

And it further appearing to the Court that said D. C. Norcross, as Secretary of the Western Fuel Company, a corporation, although at all of said times having ability so to do, willfully and contumaciously refused and still refuses to obey said subpoena or said order of this court or to produce before said Grand Jury said books, papers, records, vouchers and documents or any of them so within his possession or under his control.

NOW, THEREFORE, by reason of the premises aforesaid, it is hereby ordered, adjudged and decreed that said D. C. Norcross as Secretary of said Western Fuel Company, a corporation, is and he is hereby adjudged to be, in contempt of the District Court of the United States for the Northern District of California.

It is further ordered, adjudged and decreed, as

punishment for said contempt, that said D. C. Norcross be, and he is hereby ordered imprisoned in the County Jail of Alameda County, State of California, until he obeys said subpoena and said order of said Court, aforesaid, and produces before said Grand Jury said books, papers, records, vouchers and documents so in his possession and under his control as Secretary of said Western Fuel Company, a corporation.

It is further ordered, adjudged and decreed that a writ of commitment forthwith issue from this court directed to the Marshal of the United States of America for the Northern District of California commanding and requiring said Marshal to take and keep and safely deliver the said D. C. Norcross into the custody of the keeper or warden and other officers in charge of said Alameda County Jail, to be there kept and imprisoned until he obeys said subpoena and order aforesaid. [21]

Let execution issue forthwith.

Done in open court this 5th day of September, 1913.

M. T. DOOLING,

Judge of the District Court of the United States for
the Northern District of California, First
Division.

[Endorsed]: Filed Sep. 5, 1913. W. B. Maling,
Clerk. By Lyle S. Morris, Deputy Clerk. [22]

**Exhibit "C" [Presentment by Grand Jury Against
D. C. Norcross].**

*In the District Court of the United States, in and
for the Northern District of California, First
Division.*

At a stated term of said court, begun and holden in the City and County of San Francisco, within and for the State and Northern District of California, on the first Monday of July in the year of our Lord One Thousand Nine Hundred and Thirteen;

The Grand Jurors of the United States of America within and for the State and District aforesaid, on their oaths, present and return to said court the following presentment against D. C. Norcross, as Secretary of the Western Fuel Company, a corporation:

That heretofore, to wit, on the 14th day of August, 1913, a subpoena was duly issued out of and under the seal of the above-entitled court, directed to said D. C. Norcross, as Secretary of the Western Fuel Company, a corporation, a true and correct copy of which subpoena is hereunto annexed, hereby referred to, marked Exhibit "A" and hereby made a part hereof; that thereafter and on said 14th day of August, 1913, at the City and County of San Francisco, in said State and Northern District of California, said subpoena was duly served upon said D. C. Norcross, as Secretary of the Western Fuel Company, a corporation, by a Deputy United States Marshal in and for the said Northern District of

[23] California, by said Deputy United States Marshal then and there delivering to and leaving with D. C. Norcross, as Secretary of said Western Fuel Company, a corporation, a true and correct copy of said subpoena, and at the same time showing him the original thereof.

That thereafter, and at the time and place designated in said subpoena, to wit, 2 o'clock P. M. on said 14th day of August, 1913, in the Postoffice building in the City and County of San Francisco, State of California, and in pursuance of said subpoena, said D. C. Norcross, as Secretary of said Western Fuel Company, a corporation, appeared before said Grand Jury at a session then being duly held by said Grand Jury, and was then and there duly sworn by the foreman of said Grand Jury to testify as a witness in an investigation then being pursued by said Grand Jury concerning certain frauds alleged to have been perpetrated and committed by said Western Fuel Company against the United States.

That said D. C. Norcross, as Secretary of said Western Fuel Company, a corporation, refused to produce before said Grand Jury any of the books, papers or documents described and referred to in said subpoena, and during said session of said Grand Jury said D. C. Norcross, as Secretary of said corporation, informed said Grand Jury that he, as Secretary of said corporation, would not, in obedience to said subpoena, produce said books, papers and documents, or any of them.

That said D. C. Norcross, as such Secretary, here-

tofore testified before said Grand Jury that he was, and [24] had been for many years, the Secretary of said Western Fuel Company, a corporation, and that as such Secretary he had and still had the possession, custody and control of all of said papers, records and documents referred to in said subpoena, excepting certain of said records destroyed in the fire of April 18th, 1906, and that he would not produce before said Grand Jury, in obedience to any subpoena served upon him, said books, records, or papers, or any of them.

WHEREFORE said Grand Jury returns this presentment against said D. C. Norcross, as Secretary of said Western Fuel Company, a corporation, so that said D. C. Norcross, as Secretary of said corporation, may be brought before this Honorable Court and dealt with according to law.

Dated: August 14, 1913.

JOHN R. HANIFY,

Foreman of the Grand Jury.

MATT I. SULLIVAN,

THEO. J. ROCHE,

Assistants to the Attorney General of the United States.

BENJ. L. McKINLEY,

U. S. Attorney. [25]

[Endorsed]: Presented in open court and filed Aug. 14, 1913. W. B. Maling, Clerk. By Francis Krull, Deputy Clerk. [26]

Exhibit "D" [Citation to D. C. Norcross to Show Cause].

**UNITED STATES OF AMERICA, NORTHERN
DISTRICT OF CALIFORNIA.**

*In the District Court of the United States for the
Northern District of California.*

In the Matter of the Presentment Heretofore Returned by the Grand Jury Against D. C. NORCROSS, as Secretary of the WESTERN FUEL COMPANY, a Corporation, for Contempt of the Above-entitled Court.

It appearing to the above-entitled court that on the 14th day of August, 1913, a subpoena was duly issued out of and under the seal of the above-entitled court, directed to D. C. Norcross, as Secretary of the Western Fuel Company, a corporation, requiring and commanding said D. C. Norcross, as Secretary of said Western Fuel Company, a corporation, to appear before the Grand Jury of the United States of America, within and for the Northern District of California, at a district court to be held in the United States courthouse in the Postoffice Building, in the City and County of San Francisco, [27] on the 14th day of August, 1913, at 2 o'clock in the afternoon, and that at said time and place he produce certain books, papers, records, vouchers and documents specifically described in said subpoena; that thereafter and on the 14th day of August, 1913, at the City and County of San Francisco, in said State and Northern District of California, said sub-

poena was duly served upon said D. C. Norcross, as Secretary of the Western Fuel Company, a corporation, by a deputy United States marshal in and for the Northern District of California, by said deputy United States marshal then and there delivering to and leaving with said D. C. Norcross, as such secretary of said corporation, a true and correct copy of said subpoena, and at the same time showing him the original thereof; that thereafter, and at the time and place designated in said subpoena, to wit at 2 o'clock in the afternoon of said 14th day of August, 1913, in the Postoffice Building in the City and County of San Francisco, State of California, and in pursuance of said subpoena, said D. C. Norcross appeared before said Grand Jury, at a session then being duly held by said Grand Jury, and was then and there duly sworn by the foreman of said Grand Jury to testify as a witness in an investigation then being pursued by said Grand Jury concerning certain frauds alleged to have been perpetrated and committed by said Western Fuel Company against the United States; that said D. C. Norcross, as Secretary of said Western Fuel Company, a corporation, refused to produce before said Grand Jury any of the books, papers, records, vouchers or documents described or referred to in said subpoena, and during said session of said Grand Jury said D. C. Norcross, as Secretary of said corporation, [28] informed said Grand Jury that neither said Western Fuel Company, a corporation, nor said D. C. Norcross, as secretary thereof, would in obedience to said subpoena, produce said books, papers, records,

vouchers and documents, or any of them;

And it further appearing to the Court that said D. C. Norcross, as such Secretary, had and still has possession, custody and control of all of said books, papers, records, vouchers, and documents referred to in said subpoena, excepting certain of said records in existence prior to the 18th day of April, 1906, and destroyed on said date, and that he would not produce before said Grand Jury, in obedience to said, or any, subpoena served upon him, said books, papers, records, vouchers and documents, or any of them;

And it further appearing to the Court that on the 14th day of August, 1913, said Grand Jury returned into this Court and filed with the Clerk thereof a presentment against said D. C. Norcross, as such Secretary, in which the facts above set forth were found by said Grand Jury, and said Grand Jury requested that said D. C. Norcross, as such Secretary, be brought before this Court and dealt with according to law;

And the Court having ordered that said D. C. Norcross, as Secretary of the Western Fuel Company, a corporation, show cause before the First Division of the District Court of the United States, for the Northern District of California, at a session to be held in the courtroom of said Court, in the Post-office Building, in the City and County of San Francisco, on Monday, the 18th day of August, 1913, at 10 o'clock [29] A. M., why he should not be adjudged guilty of contempt of this Court and punished for said contempt, in failing, refusing and

neglecting to obey said subpoena and to produce before said Grand Jury said books, papers, records, vouchers and documents in his possession or under his control as Secretary of said Western Fuel Company, a corporation;

NOW, THEREFORE, you, said D. C. Norcross, are hereby commanded to be and appear before said First Division of the District Court of the United States, for the Northern District of California, at a session to be held in the courtroom of said Court, in the Postoffice Building, in the City and County of San Francisco, on Monday, the 18th day of August, 1913, at 10 o'clock A. M., then and there to show cause, if any you have, why you should not be adjudged guilty of contempt of this Court and punished therefor, in failing, refusing and neglecting to obey said subpoena and produce before said Grand Jury said books, papers, records, vouchers and documents, in your possession or under your control as such Secretary of said Western Fuel Company, a corporation.

WITNESS, the Honorable MAURICE T. DOOLING, Judge of said District Court for the Northern District of California, this 16th day of August, in the year of our Lord one thousand and nine hundred and thirteen.

[Seal]

W. B. MALING,
Clerk.

By Francis Krull,
Deputy Clerk.

A true copy. Attest:

W. B. MALING,
Clerk.

By Francis Krull,
Deputy Clerk. [30]

**Exhibit "E" [Order Requiring D. C. Norcross to
Produce Certain Books, etc., Before Grand
Jury].**

*In the District Court of the United States, in and for
the Northern District of California.*

In the Matter of the Presentment Returned by the
Grand Jury of the United States of America,
Within and for the State and Northern Dis-
trict of California, Against D. C. NOR-
CROSS, as Secretary of the WESTERN
FUEL COMPANY, a Corporation.

The Grand Jury of the United States of Amer-
ica, within and for the State and Northern District
of California, having heretofore presented and re-
turned to the above-entitled court a presentment
against D. C. Norcross, as Secretary of the Western
Fuel Company, a corporation, for having refused to
produce before said Grand Jury certain books, pa-
pers and documents described and referred to in
that certain *subpoena duces tecum*, issued out of and
under the seal of the above-entitled court on the 14th
day of August, 1913, directed to said D. C. Norcross
as Secretary of the Western Fuel Company, a cor-
poration, requiring him [31] as such Secretary,
to produce said books, papers and documents before

said Grand Jury, at a session thereof held on said 14th day of August, 1913, at the place referred to in said subpoena, a copy of which subpoena is attached to and made a part of said presentment; and thereafter, and on the 18th day of August, 1913, said D. C. Norcross, as Secretary of the Western Fuel Company, a corporation, having appeared before the above-entitled court in response to said presentment, to show cause, if any he had, why he should not be punished for a contempt of said Court in having failed and refused to obey said subpoena and to produce before said Grand Jury at said time and place designated in said subpoena, said books, papers and documents, or any of them;

NOW, THEREFORE, in order to enable said D. C. Norcross, as such secretary of said Western Fuel Company, a corporation, to obey said subpoena and comply with the terms and requirements thereof and to produce before said Grand Jury said books, papers and documents referred to and described in said subpoena, IT IS HEREBY ORDERED, that said D. C. Norcross, as Secretary of said Western Fuel Company, a corporation, produce before said Grand Jury, at a session thereof to be held on Thursday, the 4th day of September, 1913, at 2 o'clock P. M. of said day, all of said books, papers and documents described and referred to in said subpoena.

Dated: September 3d, 1913.

M. T. DOOLING,
Judge.

[Seal] A true copy. Attest:

W. B. MALING,
Clerk.

By Lyle S. Morris,
Deputy Clerk.

[Endorsed]: Filed Sep. 3, 1913. W. B. Maling,
Clerk. By Lyle S. Morris, Deputy Clerk. [32]

**Exhibit "F" [Citation Requiring Western Fuel Co.
to Show Cause].**

UNITED STATES OF AMERICA, NORTHERN
DISTRICT OF CALIFORNIA.

*In the District Court of the United States, for the
Northern District of California.*

In the Matter of the Presentment Returned by the
Grand Jury of the United States of America,
Within and for the State and Northern Dis-
trict of California, Against WESTERN
FUEL COMPANY, a Corporation.

Northern District of California,—ss.

The President of the United States of America, to
Western Fuel Company, a Corporation.

You are hereby required to be and appear before
the First Division of the District Court of the
United States in and for the Northern District of
California, at its Courtroom, situated in the United
States Postoffice Building, located in the City and
County of San Francisco, State of California, on

Friday the 5th day of September, 1913, at 4:30 o'clock P. M., on said day then and there to show cause, if any you have why you should not be adjudged guilty of contempt of this Court, and punished for said contempt, in failing, refusing and neglecting to produce before the grand jury of the United States of America, in and for the Northern District of California, at the session held by said grand jury, certain books, papers, records, vouchers and documents, described in a certain subpoena issued out of this court on the 14th day of August, 1913, requiring you to produce before said [33] grand jury the said books, papers, documents, records and vouchers, which subpoena was heretofore served upon you; also disobeying the order heretofore made by this Court, directing production before said grand jury of said books, papers, documents and vouchers.

Witness, the Honorable M. T. DOOLING, Judge of said court, this 5th day of September, in the year of our Lord, one thousand nine hundred and thirteen, and of our independence the one hundred and thirty-eighth.

W. B. MALING,
Clerk.

By _____,
Deputy Clerk.

I, W. B. Maling, Clerk of the District Court of the United States for the Northern District of California, do hereby certify the foregoing to be a full, true and correct copy of Citation directed to Western Fuel Company, a corporation, to show cause why it

should not be punished for contempt of Court, as the same was issued.

Attest my hand and the seal of said District Court,
this 5th day of September, A. D. 1913.

[Seal]

WALTER B. MALING,
Clerk. [34]

[**Affidavit of W. H. Tidwell.**]

UNITED STATES OF AMERICA, NORTHERN
DISTRICT OF CALIFORNIA.

*In the District Court of the United States for the
Northern District of California.*

In the Matter of the Presentment Returned by the
Grand Jury of the United States of America,
Within and for the State and Northern Dis-
trict of California, Against D. C. NOR-
CROSS, as Secretary of the WESTERN
FUEL COMPANY, a Corporation.

United States of America,
Northern District of California,—ss.

W. H. Tidwell, having been first duly sworn, de-
poses and says:

On the 14th day of August, 1913, the Grand Jury
of the United States of America, within and for the
Northern District of California, duly returned into
this court and filed with the clerk thereof a present-
ment against D. C. Norcross, as Secretary of the
Western Fuel Company, a corporation, for refusing
to produce before said Grand Jury certain books,
papers, records, vouchers and documents specifi-
cally described [35] and referred to in a certain

subpoena duly issued out of and under the seal of this court on the 14th day of August, 1913, directed to said D. C. Norcross, as Secretary of the Western Fuel Company, a corporation, to appear before said Grand Jury of the United States of America, within and for the Northern District of California, at a session to be held in the United States courthouse in the Postoffice Building, in the City and County of San Francisco on the 14th day of August, 1913, at 2 o'clock in the afternoon of said day, and at said time and place to produce said books, papers, records, vouchers and documents;

Upon the return and filing of said presentment, this Court gave and made its order directing that said D. C. Norcross, as such Secretary, show cause before the First Division of the District Court of the United States, for the Northern District of California, at a session to be held in the courtroom of said court, in the Postoffice Building, in the City and County of San Francisco, State of California, on Monday, the 18th day of August, 1913, at the hour of 10 o'clock A. M. of said day, why he should not be adjudged guilty for contempt of this court, and punished for such contempt, in refusing to obey said subpoena, and to produce before said Grand Jury said books, papers, records, vouchers and documents in his possession and under his control as such Secretary.

On said 18th day of August, 1913, at the time and place specified in said order, said D. C. Norcross, as such Secretary of said Western Fuel Company, appeared before said court in response to said pre-

sentment and said order of said court; [36]

At said time and place a hearing was had upon said presentment and said order, evidence was introduced, and the matter was submitted to the Court for its consideration and decision.

Thereafter, and on the 3d day of September, 1913, the above-entitled court, in the above-entitled proceeding, duly gave and made its order directing said D. C. Norcross, as such Secretary of said Western Fuel Company, to produce before said Grand Jury, at a session thereof to be duly held by said Grand Jury at 2 o'clock P. M. on the 4th day of September, 1913, in the courtroom of said court, in the Postoffice Building, in the City and County of San Francisco, said books, papers, vouchers and documents described and referred to in said subpoena, in his possession and under his control as such Secretary.

Thereafter, and on said 3d day of September, 1913, a true and correct copy of said order, duly certified by the Clerk of said court, was duly served by the United States Marshal in and for the Northern District of California upon said D. C. Norcross as such Secretary of said Western Fuel Company, a corporation;

Said Grand Jury of the United States of America, within and for the Northern District of California, duly held a session at 2 o'clock P. M. on said 4th day of September, 1913, at said place specified in said order;

Said D. C. Norcross, as such Secretary, failed, neglected and refused to appear before said Grand Jury at said session, or to produce said books, papers,

vouchers or documents, or any of them; [37]

Affiant hereby refers to said presentment, and said orders, so made by said court, as though each of the same were herein specifically set forth.

WHEREFORE, affiant prays that said D. C. Norcross be adjudged guilty of contempt of this court, and punished therefor, for failing, refusing and neglecting to obey said subpoena, and said order of said court last referred to, and to produce before said Grand Jury said books, papers, records, vouchers and documents in his possession, or under his control, as such Secretary.

W. H. TIDWELL.

Subscribed and sworn to before me this 5th day of September, 1913.

[Seal]

W. B. MALING,

Clerk United States District Court in and for the Northern District of California. [38]

[Subpoena Duces Tecum to D. C. Norcross.]

UNITED STATES OF AMERICA, NORTHERN DISTRICT OF CALIFORNIA.

In the District Court of the United States for the Northern District of California.

The President of the United States of America, to D. C. Norcross, as Secretary of the Western Fuel Company, a Corporation, Greeting:

WE COMMAND YOU, that all business and excuses being laid aside, you appear before the Grand Jury of the United States of America, within and

for the Northern District of California, at a district court to be held in the United States courthouse, in the Postoffice Building, in the City and County of San Francisco, on the 14th day of August, 1913, at 2 o'clock in the afternoon, and that you produce before the said Grand Jury at the time and place aforesaid, the following:

All books, papers, records and vouchers of the Western Fuel Company, a corporation, in your possession or under your control, showing the amount and weight of coal in the bunker of the Western Fuel Company situate on Folsom Street Dock in the City and County of San Francisco on the 1st day of January, 1904, including [39] the amount of coal in the off-shore bunker and the amount of coal in the in-shore bunker, and also showing the amount and weight of coal on the 1st day of January, 1904, in the coal yard of said Western Fuel Company connected with said bunker by a tramway and situate on East Street, in said City and County of San Francisco; and also showing the amount and weight of all coal in all other bunkers and places containing, or which contained coal of the Western Fuel Company on the 1st day of January, 1904, in the State of California.

Also all books, papers, records and vouchers of said Western Fuel Company, in your possession or under your control, showing the total amount and weight of coal delivered from said bunker, including the off-shore bunker and the in-shore bunker and delivered from said yard, between the

1st day of January, 1904, and the date hereof.

Also all books, papers, records and vouchers of said Western Fuel Company, in your possession or under your control, showing the amount and weight of coal on this date in said bunker of said Western Fuel Company, including said off-shore and said in-shore bunker, and in said yard.

Also all books, papers, records and vouchers of the Western Fuel Company, a corporation, in your possession or under your control, showing the amount and weight of coal in the bunker of the Western Fuel Company, situate on said Folsom Street Dock, on the 1st day of May, 1906, including the amount of coal in the off-shore bunker and the amount of coal in the in-shore bunker; and also showing the amount and weight of coal on the 1st day of May, 1906, in said coal-yard of said Western Fuel Company, and also showing the amount and weight of all coal in all other bunkers and places in the State of California containing or which contained coal of the Western Fuel Company on the 1st day of May, 1906.

Also all books, papers, records and vouchers of said Western Fuel Company, in your possession or under your control, showing the total amount and weight of coal delivered from said bunker, including the off-shore bunker and the in-shore bunker, and delivered from said yard, between the 1st day of May, 1906, and the date hereof; also showing all coal delivered from any and all other bunkers and places containing, or which contained coal of the Western Fuel Company between the

1st day of January, 1904, and the date hereof, and also between the 1st day of May, 1906, and the date hereof.

Also all books, papers, records and documents of said Western Fuel Company, a corporation, in your possession or under your control, showing the weight of each load of coal taken from said in-shore and said off-shore bunker and out of said yard, and out of all other bunkers and places containing, or which contained coal of said Western Fuel Company, between the 1st day of January, 1904, and the date hereof; also showing the name of the person or persons to whom each of said loads of coal was sold or delivered, the date or dates upon which each of said loads of coal was so sold or delivered, and the amount charged to the person or persons to whom each of said loads of coal was so sold or [40] delivered, and the amount paid for each of said loads of coal so sold or delivered.

Also all weekly, monthly and yearly financial and other reports made to the Directors of the Western Fuel Company, showing the financial condition of the affairs of said company; also the minute-books of said company containing the minutes of the meetings of the Directors and the minutes of the meetings of the stockholders of said company between the 1st day of January, 1904 and date hereof.

Also all stock ledgers, stock journals and stock certificate books showing the names of the various holders of shares of the capital stock of said West-

ern Fuel Company on the 1st day of January, 1904, and at all times between January 1, 1904, and the date hereof.

Also all ledgers, cash-books and papers showing the expenses incurred and paid out by said Western Fuel Company between the 1st day of January, 1904, and the date hereof, and to whom said payments were made.

Witness, the Honorable WM. C. VAN FLEET, Judge of said District Court for the Northern District of California, this 14th day of August, in the year of our Lord one thousand nine hundred and thirteen.

[Seal]

W. B. MALING,
Clerk.

By Lyle S. Morris,
Deputy Clerk.

M. J. SULLIVAN,
THEO. J. ROCHE,

Assistants to the Attorney General of the
United States.

BENJ. L. McKINLEY,
Acting U. S. Attorney. [41]

Exhibit "H" [Indictment Against Howard et al.].

*In the District Court of the United States, in and for
the Northern District of California, First Division.*

At a stated term of said Court begun and holden at the City and County of San Francisco, within and for the State and Northern District of California,

on the first Monday of November, in the year of our Lord One thousand nine hundred and twelve.

The Grand Jurors of the United States of America, within and for the State and District aforesaid, on their oaths present: THAT

JOHN L. HOWARD, JAMES B. SMITH, J. L. SCHMITT, ROBERT BRUCE, SYDNEY V. SMITH, F. C. MILLS, E. H. MAYER, and EDWARD J. SMITH,

hereinafter called the defendants, whose more full and true names are to the Grand Jurors unknown, heretofore, to wit, on the first day of January, in the year of our Lord one thousand nine hundred and four, in the State and Northern District of California, and within the jurisdiction of this Honorable Court, then and there being, did then and there wilfully, knowingly, unlawfully, wickedly, corruptly and feloniously conspire, combine, confederate and agree together among themselves and with divers other persons

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whose names are to the Grand Jurors aforesaid unknown, and for that reason not herein set forth, to defraud the United States in the manner following, that is to say:

That the said Western Fuel Company was at all the times herein mentioned, a corporation organized, [42] existing and doing business under and by virtue of the laws of the State of California, and was at all of said times engaged in the importation into the United States and the sale of coals for fuel, and in purchasing coals from divers other persons, firms

and corporations so importing coals into the United States for fuel;

That the said defendants and said divers other persons whose names are to said Grand Jurors unknown, did plan, confederate, conspire and agree, under the guise and name of the said corporation, to wit, Western Fuel Company, to defraud the United States out of a large part of the import duties on coal imported and brought into the United States by said Western Fuel Company by itself and through other persons, firms and corporations from divers foreign countries, ports and places for said Western Fuel Company, and to defraud the United States out of a large portion of the duties due to the United States on divers shiploads and cargoes of coal so imported by said Western Fuel Company and other persons, firms and corporations as aforesaid and coming into the Port of San Francisco, by making and causing to be made false weights and false and fraudulent returns of weights of such cargoes and importations of coal, and by further fraudulently weighing and causing to be weighed by themselves and by the Pacific Mail Steamship Company, a corporation, and by other persons and corporations whose names are to the Grand Jurors aforesaid unknown, and for that reason not herein stated, and reported to the United States, the weights of all such importations of coal loaded from the bunkers and barges of said Western Fuel Company for fuel on board vessels [43] propelled by steam, and engaged in trade with foreign countries and in trade between the Atlantic and Pacific ports of the United States, and which ships or vessels were

registered under the laws of the United States; and further to defraud the United States by making, and causing to be made false returns, weights and entries of coal shipped and loaded aboard the transports of the United States Army Service and other Government ships purchasing coal at San Francisco Harbor; and to that end, and for the purpose of carrying out such conspiracy, combination and agreement, to maintain on the docks, wharves and barges owned, operated, controlled and occupied by said Western Fuel Company and by the said defendants at the Port of San Francisco, in the State and Northern District of California, scales and weights which were to be and were fraudulently manipulated by the defendants to the end that said scales should record the weights of said coal desired by the defendants, and not the true weights of the coal placed thereon, and the said defendants did so manipulate said scales and weights and the method of weighing thereon, so that said scales and weights did record the weights of coal desired by said defendants, and not the true weight of the coal so placed thereon; and to further cause fraudulent affidavits and statements to be made by the defendants and by each of them to the officers of the Government of the United States, and to other persons and corporations whose names are to the Grand Jurors aforesaid unknown, and for that reason not herein stated, and to the Pacific Mail Steamship Company, a corporation organized and existing under and by virtue of the laws of the State of New York [44] and engaged in the shipping and transportation of freight and passengers, with

offices located in the City and County of San Francisco, and which operated and still operates American registered vessels engaged in foreign trade and buying coal from said Western Fuel Company for the purpose and to the end that said Pacific Mail Steamship should claim from the United States a greater rebate on the drawback of coal duties permitted where coal is loaded upon American registered vessels engaged in foreign trade than the true weight of said coal would permit said Pacific Mail Steamship Company to claim or was due the said Pacific Mail Steamship Company;

And further to cause all coal weighed in, on or about the scales upon which the coal handled by said Western Fuel Company was weighed, to be incorrectly measured and weighed to the end and for the purpose that the defendants, acting under the name and guise of said Western Fuel Company aforesaid, should receive the profit and gain to be made by such incorrect and fraudulent weight;

That said conspiracy, combination, confederation, and agreement was continuously in effect and operation and in process of execution by the said defendants and each of them from and including the first day of January in the year of our Lord one thousand nine hundred and four, to and including the twenty-fourth day of February in the year of our Lord one thousand nine hundred and thirteen, and the said conspiracy, combination, confederation and agreement was continuously in operation [45] and in process of execution by said defendants during all of the times mentioned in this indictment, and was

continuously in operation and in process of execution by said defendants and each of them during all the times mentioned in each and every overt act herein-after set forth and alleged in this indictment;

And the Grand Jurors aforesaid, on their oaths aforesaid, do further present that in furtherance of said conspiracy, combination, confederation and agreement and to effect and accomplish the object thereof, the said defendant F. C. Mills did, on the fourth day of January, one thousand nine hundred and thirteen, at the City and County of San Francisco, in the State and Northern District of California, make and enter in the book of the Western Fuel Company kept for the recording of the weight of coal loaded from barges into vessels, the following entry:

"Shinyo Maru	389.1337	
Siberia	690.1462	1080.559

Over 60.1759."

And the Grand Jurors aforesaid, on their oaths aforesaid, do further present that in furtherance of said conspiracy, combination, confederation, and agreement, and to effect and accomplish the object thereof, the said defendant F. C. Mills did, on the ninth day of January, one thousand nine hundred and thirteen, at the City and County of San Francisco, in the State and Northern District of California, make and enter in the book of the Western Fuel Company kept for the recording of the weight of coal loaded from barges into vessels the following entry:

"Siberia	810.19		
Andrew Kelly	40.		
G. E. Foster	40	890.19	[46]

Over 20.1299."

And the Grand Jurors aforesaid, on their oaths aforesaid, do further present that in furtherance of said conspiracy, combination, confederation and agreement, and to effect and accomplish the object thereof, the said defendant F. C. Mills did, on the tenth day of January, one thousand nine hundred and thirteen, at the City and County of San Francisco, in the State and Northern District of California, make and enter in the book of the Western Fuel Company kept for the recording of the weight of coal loaded from barges into vessels, the following entry:

"Korea	974.449		
Mathilde	210.145	1184.593	

Over 72.1023."

And the Grand Jurors aforesaid, on their oaths aforesaid, do further present that in furtherance of said conspiracy, combination, confederation and agreement and to effect and accomplish the object thereof, the said defendant, F. C. Mills, did on the fourteenth day of January, one thousand nine hundred and thirteen, at the City and County of San Francisco, in the State and Northern District of California, make and enter in the book of the Western Fuel Company kept for the recording of the

weight of coal loaded from barges into vessels, the following entry:

“Ex ‘Comanche’ Wellg.

Ac. Wellington 444.1270

Steamer China 556.1795

Over 112.525.” [47]

And the Grand Jurors aforesaid, on their oaths aforesaid, do further present that in furtherance of said conspiracy, combination, confederation and agreement, and to effect and accomplish the object thereof, the said defendant F. C. Mills did, on the twentieth day of September, one thousand nine hundred and twelve, at the City and County of San Francisco, in the State and Northern District of California, make and enter in the book of the Western Fuel Company kept for the recording of the weight of coal loaded from barges into vessels, the following entry:

“Ex ‘Wellington’

Ac. Off Shore Bunkers 107.590

“ Christian Bors 1597.1180

“ Off Shore Bunkers 16.1300

“ Solveig 1634.1410

3356.

Korea 1363.1010

Damara 300.1464

Nippon Maru 1699.450

Tenyo Maru 268.485 3531.1169

Over 175.1169.”

And the Grand Jurors aforesaid, on their oaths

aforesaid, do further present that in furtherance of said conspiracy, combination, confederation and agreement, and to effect and accomplish the object thereof, the said defendant F. C. Mills did, on the first day of December, one thousand nine hundred and eleven, at the City and County of San Francisco, in the State and Northern District of California, make and enter in the book of [48] the Western Fuel Company kept for the recording of the weight of coal loaded from barges into vessels, the following entry:

“Persia	209.1916
Korea	567.1492
Over 33.1478.”	

And the Grand Jurors aforesaid, on their oaths aforesaid, do further present that in furtherance of said conspiracy, combination, confederation and agreement, and to effect and accomplish the object thereof, the said F. C. Mills did, on the sixth day of January, one thousand nine hundred and thirteen, at the City and County of San Francisco, in the State and Northern District of California, pay and cause to be paid to the engineer of the “Shinyo Maru,” whose name is to the Grand Jurors unknown and is therefore not stated herein, but who was the engineer on the said steamship, “Shinyo Maru” belonging to and operated by the Toyo Kisen Kaisha, a sum of money equivalent to two and one-half cents per ton for all coal which had been, immediately prior to said payment, loaded on said “Shinyo Maru” by the Western Fuel Company, said payment being in lawful money of the United States

and made in order to cause, procure and induce the said engineer to refrain from disclosing to the officers of the United States the existence and operation by said defendants of the said conspiracy, and thereby to enable the said defendants to continue to consummate the object of the said conspiracy and agreement;

And the Grand Jurors aforesaid, on their oaths [49] aforesaid, do further present that in furtherance of said conspiracy, combination, confederation and agreement, and to effect and accomplish the object thereof, the said defendant James B. Smith, at the City and County of San Francisco, in the State and Northern District of California, on the thirty-first day of August, one thousand nine hundred and eleven, caused to be paid to the Engineer of the "American Maru," whose name is to the Grand Jurors unknown, and is for that reason not herein stated, which said steamship belonged to the Toyo Kisen Kaisha, a sum of money equivalent to two and one-half cents for each and every ton of coal which had been immediately prior thereto loaded aboard said steamship by the Western Fuel Company, said payment being made in order to cause, procure, and induce the engineer aforesaid to refrain from disclosing to the officers of the United States the existence and operation by said defendants of the said conspiracy, and thereby to enable said defendants to continue to consummate and effect the object of the said conspiracy;

And the Grand Jurors aforesaid, on their oaths aforesaid, do further present that in furtherance of

said conspiracy, combination, confederation and agreement and to effect and accomplish the object thereof, the said defendant James B. Smith did, at divers times during the month of December, one thousand nine hundred and twelve, the exact dates in said months being to the Grand Jurors aforesaid unknown, and therefore not stated herein, go to the Folsom Street Bunkers of the Western Fuel Company on the water front of the City and [50] County of San Francisco, State and Northern District of California;

And the Grand Jurors aforesaid, on their oaths aforesaid, do further present that in furtherance of said conspiracy, combination, confederation and agreement, and to effect and accomplish the object thereof, the said defendant James B. Smith did, at divers times during the month of October one thousand nine hundred and twelve, the exact dates in said month being to the Grand Jurors aforesaid unknown, and therefore not stated herein, go to the Folsom Street Bunkers of the Western Fuel Company on the water front of the City and County of San Francisco, State and Northern District of California;

And the Grand Jurors aforesaid, on their oaths aforesaid, do further present that in furtherance of said conspiracy, combination, confederation and agreement, and to effect and accomplish the object thereof, the said defendant James B. Smith did, on the third day of May, one thousand nine hundred and eleven, sign and swear to an affidavit in the following language, to wit:

"I, James B. Smith, Vice-president and Stockholder, Western Fuel Company, do solemnly swear that the merchandise herein described was imported as herein stated; that the duties were paid thereon, as herein shown, without allowance or deduction for damage or other cause, except as herein set forth; and that the said merchandise has been delivered to said Pacific Mail Steamship Company between Jany. 27 and February 15-11; and that no other certificate of delivery covering the above [51] merchandise has been issued by me.

JAMES B. SMITH, Importer.

Sworn to before me this 3 day of May, 1911.

GEO. H. PROBASCO,

Notary Public in and for the City and County of San Francisco, State of California. Commission expires April 14, 1913."

AGAINST the peace and dignity of the United States of America, and contrary to the form of the statute of the said United States of America in such case made and provided.

JOHN L. McNAB,

United States Attorney.

NAME OF WITNESS APPEARING BEFORE
GRAND JURY.

W. H. Tidwell. [52]

**Exhibit "I" [Indictment Against Howard et al.
(Filed Feb. 19, 1913)].**

*In the District Court of the United States, in and
for the Northern District of California, First
Division.*

(5220)

At a stated term of said Court begun and holden at the City and County of San Francisco, within and for the State and Northern District of California, on the first Monday in November, in the year of our Lord Nineteen Hundred and Twelve,

The Grand Jurors of the United States of America, within and for the State and District aforesaid, on their oaths present: THAT

JOHN L. HOWARD, JAMES B. SMITH, J. L. SCHMITT, ROBERT BRUCE, SYDNEY V. SMITH, F. C. MILLS, E. H. MAYER, AND EDWARD J. SMITH,

hereinafter called the defendants, whose more full and true names are to the Grand Jurors unknown, heretofore, to wit, on the first day of April in the year of our Lord Nineteen Hundred and Six, in the State and Northern District of California and within the jurisdiction of this Honorable Court then and there being, did wilfully, knowingly, unlawfully, wickedly, corruptly, and feloniously conspire, combine, confederate and agree together

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among themselves and with divers other persons whose names are to the Grand Jurors aforesaid unknown and for that rea-

son not herein set forth, to defraud the United States in the manner following, that is to say:

That the said Western Fuel Company was at all the times herein mentioned a corporation organized, existing and doing business under and by virtue of the laws of [53] the State of California, and was at all of said times engaged in the importation into the United States and the sale of coals for fuel, and in purchasing coals from divers other persons, firms and corporations so importing coals into the United States for fuel;

That the said defendants and said divers other persons whose names are to said Grand Jurors unknown did plan, confederate, conspire and agree, under the guise and name of the said corporation, to wit, Western Fuel Company, to defraud the United States out of a large part of the import duties on coal imported and brought into the United States by said Western Fuel Company by itself and through other persons, firms and corporations from divers foreign countries, ports and places for said Western Fuel Company, and to defraud the United States out of a large portion of the duties due to the United States on divers shiploads and cargoes of coal so imported by said Western Fuel Company and other persons, firms and corporations as aforesaid and coming into the Port of San Francisco, by making and causing to be made false weights and false and fraudulent returns of weights of such cargoes and importations of coal, and by further fraudulently weighing and causing to be weighed and reported to the United States the weights of all

such importations of coal loaded from the bunkers and barges of said Western Fuel Company for fuel on board vessels propelled by steam and engaged in the trade with foreign countries and in trade between the Atlantic and Pacific ports of the United States, and which ships or vessels were registered under the laws of the United States; and further to defraud the United States by making false returns, weights and entries of coal shipped and loaded, [54] aboard the transports of the United States Army Service and other Government ships purchasing coal at San Francisco harbor; and to that end and for the purpose of carrying out such conspiracy, combination, and agreement, to maintain on the docks, wharves, and barges owned, operated, controlled, and occupied by said Western Fuel Company and by the said defendants, scales and weights which were to be and were fraudulently manipulated by the defendants to the end that said scales should record the weights of said coal desired by the defendants, and not the true weight of the coal placed thereon, and the said defendants did so manipulate said scales and weights and the method of weighing thereon so that said scales and weights did record the weights of coal desired by said defendants and not the true weight of the coal so placed thereon;

And to further cause fraudulent affidavits and statements to be made by the defendants and by each of them to the United States and to Pacific Mail Steamship Company, a corporation organized and existing under and by virtue of the laws of the State of New York and engaged in the shipping and

transportation of freight and passengers, with offices located in the City and County of San Francisco, and which operated and still operates American registered vessels engaged in foreign trade and buying coal from said Western Fuel Company for the purpose and to the end that said Pacific Mail Steamship Company should claim from the United States a greater rebate on the drawback of coal duties permitted where coal is loaded upon American registered vessels engaged in foreign trade than the true weight of said coal would permit said Pacific Mail Steamship Company [55] to claim or was due said Pacific Mail Steamship Company;

And further to cause all coal weighed in, on or about the scales upon which the coal handled by said Western Fuel Company was weighed, to be incorrectly measured and weighed to the end and for the purpose that the defendants, acting under the name and guise of said Western Fuel Company aforesaid should receive the profit and gain to be made by such incorrect and fraudulent weight;

That said conspiracy, combination, confederation, and agreement was continuously in effect and operation and in process of execution by the said defendants and each of them from and including the first day of April, Nineteen Hundred and Six, to and including the eighteenth day of February, Nineteen Hundred and Thirteen, and the said conspiracy, combination, confederation and agreement was continuously in operation and in process of execution by said defendants during all of the times mentioned in this indictment, and was continuously in operation

and in process of execution by said defendants and each of them during all the times mentioned in each and every overt act hereinafter set forth and alleged in this indictment;

And the Grand Jurors aforesaid, on their oaths aforesaid, do further present that in the furtherance of said conspiracy, combination, confederation, and agreement, and to effect and accomplish the object thereof, the said defendant F. C. Mills did, on the fourth day of January, Nineteen Hundred and Thirteen, at the City and County of San Francisco, make and enter in the book of the Western Fuel Company kept for the recording of the weight of coal loaded from barges into vessels, the following entry: [56]

"Shinyo Maru	389.1337	
Siberia	690.1462	1080.559

Over 60.1759."

And the Grand Jurors aforesaid, on their oaths aforesaid, do further present that in furtherance of said conspiracy, combination, confederation, and agreement, and to effect and accomplish the object thereof, the said defendant F. C. Mills did, on the ninth day of January, Nineteen Hundred and Thirteen, at the City and County of San Francisco, make and enter in the book of the Western Fuel Company kept for the recording of the weight of coal loaded from barges into vessels, the following entry:

"Siberia	810.19	
Andrew Kelly	40	
G. E. Foster	40	890.19

Over 20.1299."

And the Grand Jurors aforesaid, on their oaths aforesaid, do further present that in furtherance of said conspiracy, combination, confederation, and agreement, and to effect and accomplish the object thereof, the said defendant F. C. Mills did, on the tenth day of January, Nineteen Hundred and Thirteen, at the City and County of San Francisco, make and enter in the book of the Western Fuel Company kept for recording of the weight of coal loaded from barges into vessels, the following entry:

"Korea	974.448	
Mathilda	210.145	1184.593

Over 72.1023." [57]

And the Grand Jurors aforesaid, on their oaths aforesaid, do further present that in furtherance of said conspiracy, combination, confederation, and agreement, and to effect and accomplish the object thereof, the said defendant F. C. Mills did, on the fourteenth day of January, Nineteen Hundred and Thirteen, at the City and County of San Francisco, make and enter in the book of the Western Fuel Company kept for the recording of the weight of coal loaded from barges into vessels, the following entry:

"Ex 'Comanche' Wellg.		
Ac. Wellington.	444.1270	
Steamer China	556.1795	
Over 112.525."		

And the Grand Jurors aforesaid, on their oaths aforesaid, do further present that in furtherance of said conspiracy, combination, confederation, and

agreement, and to effect and accomplish the object thereof, the said defendant F. C. Mills did, on the twentieth day of September, Nineteen Hundred and Twelve, at the City and County of San Francisco, make and enter in the book of the Western Fuel Company kept for the recording of the weight of coal loaded from barges into vessels, the following entry:

“Ex ‘Wellington’

Ac. Off Shore Bunkers	107.590
“ Christian Bors	1597.1180
“ Off Shore Bunkers	16.1300
“ Solveig	1634.1410

3356. [58]

“Korea	1363.1010	
Damara	200.1464	
Nippon Maru	1699.450	
Tenyo Maru	268.485	3531.1169

Over 174.1169.”

And the Grand Jurors aforesaid, on their oaths aforesaid, do further present that in furtherance of said conspiracy, combination, confederation, and agreement, and to effect and accomplish the object thereof, the said defendant F. C. Mills did, on the first day of December, Nineteen Hundred and Eleven, at the City and County of San Francisco, make and enter in the book of the Western Fuel Company kept for the recording of the weight of

coal loaded from barges into vessels, the following entry:

"Persia	209.1916
Korea	567.1492
Over 33.1478."	

And the Grand Jurors aforesaid, on their oaths aforesaid, do further present that in furtherance of said conspiracy, combination, confederation, and agreement, and to effect and accomplish the object thereof, the said F. C. Mills did, on the sixth day of January, Nineteen Hundred and Thirteen, at the City and County of San Francisco, State and Northern District of California, pay and cause to be paid to the Engineer of the "Shinyo Maru," whose name is to the Grand Jurors unknown and is therefore not stated herein, but who was the Engineer on the said steamship "Shinyo Maru" [59] belonging to and operated by the Toyo Kisen Kaisha, a sum of money equivalent to two and one-half cents per ton for all coal which had been, immediately prior to said payment, loaded on said "Shinyo Maru" by the Western Fuel Company, said payment being in lawful money of the United States and made in order to cause, procure, and induce the said Engineer to refrain from disclosing to the officers of the United States the existence and operation by said defendants of the said conspiracy, and thereby to enable the said defendants to continue to consummate the object of the said conspiracy and agreement;

And the Grand Jurors aforesaid, on their oaths aforesaid, do further present that in furtherance of

said conspiracy, combination, confederation, and agreement, and to effect and accomplish the object thereof, the said defendant James B. Smith, at the City and County of San Francisco, in the State and Northern District of California, on the thirty-first day of August, Nineteen Hundred and Eleven, caused to be paid to the engineer of the "America Maru," whose name is to the Grand Jurors unknown and is for that reason not herein stated, which said steamship belonged to the Toyo Kisen Kaisha, a sum of money equivalent to two and one-half cents for each and every ton of coal which had been immediately prior thereto loaded aboard said steamship by Western Fuel Company, said payment being made in order to cause, procure, and induce the Engineer aforesaid to refrain from disclosing to the officers of the United States the existence and operation by said defendants of the said conspiracy, and thereby to enable said defendants to continue to consummate and effect the object of the [60] said conspiracy;

And the Grand Jurors aforesaid, on their oaths aforesaid, do further present that in furtherance of said conspiracy, combination, confederation, and agreement and to effect and accomplish the object thereof, the said defendant James B. Smith did at divers times during the month of December, Nineteen Hundred and Twelve, the exact dates in said month being to the Grand Jurors unknown and therefore not stated herein, go to the Folsom Street Bunkers of the Western Fuel Company, on the waterfront of the City and County of San Francisco, State and Northern District of California;

And the Grand Jurors aforesaid, on their oaths aforesaid, do further present that in furtherance of said conspiracy, combination, confederation, and agreement, and to effect and accomplish the object thereof, said defendant James B. Smith did, on the third day of May, Nineteen Hundred and Eleven, sign and swear to an affidavit in the following language, to wit:

“I, James B. Smith, Vice-president and stockholder, Western Fuel Company, do solemnly swear that the merchandise herein described was imported as herein stated; that the duties were paid thereon, as herein shown, without allowance or deduction for damage or other cause, except as herein set forth; and that the said merchandise has been delivered to said Pacific Mail Steamship Company between Jany. 27 and February 15-11; and that no other certificate of delivery covering the above merchandise has been issued by me.

JAMES B. SMITH,

Importer.

Sworn to before me this 3 day of May, 1911. [61]

GEO. H. PROBASCO,

Notary Public in and for the City and County of
San Francisco, State of California.

Commission expires April 14, 1913.”

AGAINST the peace and dignity of the United States of America, and contrary to the form of the statute of said United States of America in such case made and provided.

J. L. McNAB,

United States Attorney.

NAMES OF WITNESSES APPEARING BE-
FORE THE GRAND JURY:

John W. Smith.	W. H. Tidwell.
David G. Powers.	L. E. Bemis.
E. E. Englow.	Capt. Henry Nelson.
D. D. Norcross.	Edwin Powers.
Wm. Bunker.	

[Endorsed]: Presented in open court and filed Feb. 19, 1913. W. B. Maling, Clerk. By Francis Krull, Deputy Clerk. [62]

Exhibit "K" [Indictment Against Howard et al.].

In the District Court of the United States, in and for the Northern District of California, First Division.

At a stated term of said Court begun and holden at the City and County of San Francisco within and for the State and Northern District of California on the first Monday of March in the year of our Lord one thousand nine hundred and thirteen.

The Grand Jurors of the United States of America, within and for the State and Northern District of California, on their oaths present: THAT

JOHN L. HOWARD, JAMES B. SMITH, J. L. SCHMITT, ROBERT BRUCE, SIDNEY V. SMITH, F. C. MILLS, E. H. MAYER AND EDWAYD J. SMITH,

hereinafter called the defendants, whose more full and true names are to the Grand Jurors unknown, heretofore, to wit, on the first day of April, in the year of our Lord one thousand nine hundred and six, in the State and Northern District of California,

and within the jurisdiction of this Honorable Court then and there being, did willfully, knowingly, unlawfully, wickedly, corruptly and feloniously conspire, combine, confederate and agree together among themselves and with divers other persons whose names are to the Grand Jurors aforesaid, unknown, and for that reason not herein set forth, to defraud the United States in the manner following, that is to say:

That the Western Fuel Company was at all the times herein mentioned, a corporation organized, existing and doing business under and by virtue of the [63] laws of the State of California, and was at all of said times engaged in the importation into the United States and the sale of coals for fuel, and in purchasing coals from divers other persons, firms and corporations so importing coals into the United States for fuel.

That the said defendants and said divers other persons whose names are to the Grand Jurors aforesaid, unknown, did plan, confederate, conspire and agree, under the guise and name of the said corporation, to wit, Western Fuel Company, to defraud the United States out of a large part of the import duties on coal imported and brought into the United States by said Western Fuel Company by itself and through other persons, firms and corporations from divers foreign countries, ports and places for said Western Fuel Company, and to defraud the United States out of a large portion of the duties due to the United States on divers shiploads and cargoes of coal so imported by said Western Fuel Company and

other persons, firms and corporations as aforesaid and coming into the port of San Francisco, by making and causing to be made false weights and false and fraudulent returns of weights of such cargoes and importations of coal, and by further fraudulently weighing and causing to be weighed and reported to the United States the weights of all such importations of coal loaded from the bunkers and barges of said Western Fuel Company for fuel on board vessels propelled by steam and engaged in trade with foreign countries and in trade between the Atlantic and Pacific ports of the United States, and which ships or vessels were registered under the laws of the United States; [64] and further to defraud the United States by making false returns, weights and entries of coal shipped and loaded aboard the transports of the United States Army Service and other Government ships purchasing coal at San Francisco harbor; and to that end and for the purpose of carrying out such conspiracy, combination and agreement to maintain on the docks, wharves and barges owned, operated, controlled, and occupied by said Western Fuel Company and by the said defendants, scales and weights which were to be and were fraudulently manipulated by the defendants to the end that said scales should record the weights of said coal desired by the defendants, and not the true weights of the coal placed thereon, and the said defendants did so manipulate said scales and weights and the method of weighing thereon so that said scales and weights did record the weights of coal desired by said defendants and not the true

weight of the coal so placed thereon;

And to further cause fraudulent affidavits and statements to be made by the defendants and by each of them to the United States and to Pacific Mail Steamship Company, a corporation organized and existing under and by virtue of the laws of the State of New York, and engaged in the shipping and transportation of freight and passengers, with offices located in the City and County of San Francisco, and which operated and still operates American registered vessels engaged in foreign trade and buying coal from said Western Fuel Company for the purpose and to the end that said Pacific Mail Steamship Company should claim from the United States a [65] greater rebate on the drawback of coal duties permitted where coal is loaded upon American registered vessels engaged in foreign trade than the true weight of said coal would permit said Pacific Mail Steamship Company to claim or was due said Pacific Mail Steamship Company, and the defendants thereby secure the selling price for a greater number of tons than were actually delivered and sold;

And further to cause all coal weighed in, on, or about the scales upon which the coal handled by said Western Fuel Company was weighed, to be incorrectly measured and weighed to the end and for the purpose that the defendants, acting under the name and guise of said Western Fuel Company aforesaid, should receive the profit and gain to be made by such incorrect and fraudulent weight; and to that end to cause accounts and books of account to be kept

under the name of the Western Fuel Company, a corporation, in which should be recorded accounts of the invoice weights of imported coals, the recorded weights thereof on entry into the port of San Francisco, the bunker and barge weights, and weights of coal as claimed to be delivered aboard all vessels, including the fraudulent overweights of all such coal.

And further, to the end that the aforesaid fraudulent acts of the defendants should not be disclosed by the engineers and other officers of steamships purchasing coal and the fraud be discovered, did further conspire, in the same agreement, combination and conspiracy, to pay to all engineers and other officers whose names are to the Grand Jurors aforesaid unknown, of the Toyo Kisen [66] Company's steamships, and steamships of other companies to the Grand Jurors aforesaid unknown, divers sums of money as bribes to prevent the frauds of the defendants from being discovered by the United States;

That said conspiracy, combination, confederation and agreement was continuously in effect and operation and in process of execution by the said defendants and each of them from and including the first day of April, in the year of our Lord one thousand nine hundred and six, to and including the eighteenth day of June in the year of our Lord one thousand nine hundred and thirteen, and the said conspiracy, combination, confederation and agreement was continuously in operation and in process of execution of said defendants during all of the

times mentioned in this indictment, and was continuously in operation and in process of execution by said defendants and each of them, during all the times mentioned in each and every overt act hereinafter set forth and alleged in this indictment;

And the Grand Jurors aforesaid, on their oaths aforesaid, do further present that in furtherance of said conspiracy, combination, confederation, and agreement, and to effect and accomplish the object thereof, the said defendant F. C. Mills did, on the fourth day of January, in the year of our Lord one thousand nine hundred and thirteen at the City and County of San Francisco, in the State and Northern District of California, make and enter in the book of the Western Fuel Company kept for the recording of the weight of coal loaded from barges into vessels, the following entry: [67]

“Shinyo Maru	389.1337	
Siberia	690.1462	1080.559

Over 60.1759.”

And the Grand Jurors aforesaid, on their oaths aforesaid, do further present that in furtherance of said conspiracy, combination, confederation and agreement and to effect and accomplish the object thereof, the said defendant F. C. Mills did, on the ninth day of January in the year of our Lord one thousand nine hundred and thirteen, at the City and County of San Francisco, in the State and Northern District of California, make and enter in the book of the Western Fuel Company kept for the recording

of the weight of coal loaded from barges into vessels, the following entry:

“Siberia	810.19	
Andrew Kelly	40	
G. E. Foster	40	890.19

Over 20.1299.”

And the Grand Jurors aforesaid, on their oaths aforesaid, do further present that in furtherance of said conspiracy, combination, confederation and agreement, and to effect and accomplish the object thereof, the said defendant F. C. Mills did, on the tenth day of January in the year of our Lord one thousand nine hundred and thirteen, at the City and County of San *County of San* Francisco, in the State and Northern District of California, make and enter in the book of the Western Fuel [68] Company kept for the recording of the weight of coal loaded from barges into vessels, the following entry:

“Korea	974.448	
Mathilda	210.145	1184.593

Over 72.1023.”

And the Grand Jurors aforesaid, on their oaths aforesaid, do further present that in furtherance of said conspiracy, combination, confederation and agreement, and to effect and accomplish the object thereof, the said defendant F. C. Mills did, on the fourteenth day of January in the year of our Lord one thousand nine hundred and thirteen, at the City and County of San Francisco, in the State and Northern District of California, make and enter in the

book of the Western Fuel Company kept for the recording of the weight of coal loaded from barges into vessels, the following entry:

“Ex ‘Comanche’ Wellg.

Ac. Wellington	444.1270
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Steamer China	556.1796
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Over 112.525.”

And the Grand Jurors aforesaid, on their oaths aforesaid, do further present that in furtherance of said conspiracy, combination, confederation and agreement, and to effect and accomplish the object thereof, the said defendant F. C. Mills did, on the twentieth day of September in the year of our Lord one thousand nine hundred and twelve, at the City and County of San Francisco, in the State and Northern District of California, [69] make and enter in the book of the Western Fuel Company kept for the recording of the weight of coal loaded from barges into vessels, the following entry:

“Ex ‘Wellington’

Ac. Off Shore Bunkers	107.590
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“ Christian Bors	1597.1180
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“ Off Shore Bunkers	16.1300
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“ Solveig	1634.1410
-----------	-----------

3356.

Korea	1363.1010
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Damara	200.1464
--------	----------

Nippon Maru	1699.450
-------------	----------

Tenyo Maru	268.485	3531.1169
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Over 175.1169.”

And the Grand Jurors aforesaid, on their oaths aforesaid, do further present that in furtherance of said conspiracy, combination, confederation and agreement, and to effect and accomplish the object thereof, the said defendant F. C. Mills did, on the first day of December in the year of our Lord one thousand nine hundred and eleven, at the City and County of San Francisco in the State and Northern District of California, make and enter in the book of the Western Fuel Company kept for the recording of the weight of coal loaded from barges into vessels, the following entry:

“Persia 209.1916

Korea 567.1492

Over 33.1478.” [70]

And the Grand Jurors aforesaid, on their oaths aforesaid, do further present that in furtherance of said conspiracy, combination, confederation and agreement, and to effect and accomplish the object thereof, the said F. C. Mills did, on the sixth day of January in the year of our Lord one thousand nine hundred and thirteen, at the City and County of San Francisco, in the State and Northern District of California, pay and cause to be paid to the Engineer of the “Shinyo Maru,” whose name is to the Grand Jurors aforesaid, unknown, and is therefore not stated herein, but who was the engineer on the said steamship “Shinyo Maru” belonging to and operated by the Toyo Kisen Kaisha, a sum of money equivalent to two and one-half cents per ton for all coal which had been, immediately prior to said payment, loaded on said “Shinyo Maru” by the West-

ern Fuel Company, said payment being in lawful money of the United States and made in order to cause, procure, and induce the said engineer to refrain from disclosing to the officers of the United States, the existence and operation by said defendants of the said conspiracy, and thereby to enable the said defendants to continue to consummate the object of the said conspiracy and agreement;

And the Grand Jurors aforesaid, on their oaths aforesaid, do further present that in furtherance of said conspiracy, combination, confederation and agreement, and to effect and accomplish the object thereof, the said defendant James B. Smith, at the City and County of [71] San Francisco, in the State and Northern District of California, on the thirty-first day of August, in the year of our Lord one thousand nine hundred and eleven, caused to be paid to the engineer of the "American Maru," whose name is to the Grand Jurors aforesaid, unknown, and is for that reason not herein stated, which said steamship belonged to the Toyo Kisen Kaisha, a sum of money equivalent to two and one-half cents for each and every ton of coal which had been immediately prior thereto, loaded aboard said steamship by the Western Fuel Company, said payment being made in order to cause, procure, and induce, the engineer aforesaid, to refrain from disclosing to the officers of the United States the existence and operation by said defendants, of the said conspiracy, and thereby to enable said defendants to continue to consummate and effect the object of the said conspiracy;

And the Grand Jurors aforesaid, on their oaths aforesaid, do further present that in furtherance of said conspiracy, combination, confederation, and agreement, and to effect and accomplish the object thereof, the said defendant James B. Smith did, at divers times during the month of December, one thousand nine hundred and twelve, the exact dates in said month being to the Grand Jurors aforesaid unknown, and therefore not stated herein, go to the Folsom Street bunkers of the Western Fuel Company on the waterfront of the City and County of San Francisco, in the State and Northern District of California; [72]

And the Grand Jurors aforesaid on their oaths aforesaid, do further present, that in furtherance of said conspiracy, combination, confederation and agreement, and to effect and accomplish the object thereof, said defendant James B. Smith did on the third day of May in the year of our Lord one thousand nine hundred and eleven, sign and swear to an affidavit in the following language, to wit:

“I, James B. Smith, Vice-President and stockholder, Western Fuel Company, do solemnly swear that the merchandise herein described was imported as herein stated; that the duties were paid thereon, as herein shown, without allowance or deduction for damage or other cause, except as herein set forth; and that the said merchandise has been delivered to said Pacific Mail Steamship Company between Jany. 27, and February 15-11; and that no other certificate of delivery covering the above merchandise

has been issued by me.

JAMES B. SMITH,
Importer.

Sworn to before me this 3 day of May, 1911.

GEO. H. PROBASCO,
Notary Public in and for the City and County of
San Francisco, State of California.
Commission expires April 14, 1913."

AGAINST the peace and dignity of the United
States of America, and contrary to the form of the
statute of the said United States of America in such
case made and provided.

United States Attorney. [73]

NAMES OF WITNESSES APPEARING BE-
FORE THE GRAND JURY:

David Powers.

L. Bemiss.

W. H. Tidwell.

Edward Powers.

D. C. Norcross.

John W. Smith. [74]

Sass.

Exhibit "L" [Evidentiary on Hearing of Contempt Order].

In the District Court of the United States for the Northern District of California.

Honorable MAURICE T. DOOLING, Judge.

In the Matter of the Presentment Heretofore Returned by the Grand Jury Against D. C. NORCROSS, as Secretary of the WESTERN FUEL COMPANY, a Corporation, for Contempt of the Above-entitled Court.

Monday, August 18th, 1913.

EVIDENTIARY SHOWING ON HEARING OF CONTEMPT ORDER. [75]

In the District Court of the United States for the Northern District of California.

Honorable MAURICE T. DOOLING, Judge.

In the Matter of the Presentment Heretofore Returned by the Grand Jury Against D. C. NORCROSS, as Secretary of the WESTERN FUEL COMPANY, a Corporation, for Contempt of the Above-entitled Court.

Monday, August 18th, 1913.

Mr. STANLEY MOORE.—At this time, if your Honor please, the respondent would like to make an evidentiary showing consisting of an affidavit and a supplemental affidavit made by the respondent, Mr. D. C. Norcross.

The affidavit is as follows:

"D. C. Norcross, being first duly sworn, deposes and says: I am now and have been at all the times

herein mentioned the Secretary of the Western Fuel Company, and have had possession of its books and papers.

The president, vice-president, treasurer and directors of the company have been indicted for conspiracy to defraud the Government out of *sum* aggregating about \$30,000.00 through the medium of the Western Fuel Company. Three sets of indictments have been returned against them, and these indictments charge a continuing conspiracy from 1904 to June, 1913. [76]

The trial of these indictments is set for Tuesday, August 26, 1913, in this court. For several weeks past the attorneys have been requiring me to make up tables, compilations, summaries and statements from these books and certain of these tables, statements and compilations are still uncompleted and these books are being made use of every day in the preparation of the defense of its officers and directors. I am informed by the attorneys, and I believe, and I therefore state, that they will continue to require the use of these books up to the time of trial which is only eight days from to-day.

The *pruported* subpoena served upon me on August 14, 1913, calls for the production of all the books the company has. To produce them would involve a suspension of the company's business. press wagons to carry them out to the Grand Jury They are so numerous that it would take two ex-room. It consists of a wholesale demand for all the company's books and papers.

When the company's officers were informed in February of this year that the Grand Jury was conducting an investigation and desired to use its books, they instructed me to tell the then United States District Attorney, Mr. John L. McNab, that they would throw the books open to anyone designated by him to make an investigation of them.

I communicated this offer to Mr. McNab; and a day or two later he sent Mr. Tidwell with two assistants to the offices of the company for the purpose of examining the books. Mr. Tidwell and his assistants examined these books continuously for from two to three weeks. After concluding this examination they came back and borrowed a number of books, papers and statements, which they took to Mr. Tidwell's office and kept for several weeks. [77]

When indictments were afterwards returned, I and the other officials and directors of the company felt that unwarranted and unfair construction and inferences had been drawn from the information and books which had been freely and unreservedly furnished by them.

When on August 5, 1913, I was served with a subpoena to appear before the Grand Jury, I showed it to counsel and asked what it meant. Counsel informed me that the pending indictments extended from the incorporation of the Company in 1904 up to June, 1913, and that almost all the books and papers called for related to this same period, and that he believed the present pros-

ecuting attorneys were dissatisfied with the evidentiary showing upon which the indictments had been returned, and that in all probability it was merely an attempt to again get possession of the books of the company for the purpose of reviewing and again going through them.

Outside the Grand Jury room that afternoon I saw Mr. Tidwell, and I said, 'Is this for the purpose of bringing further indictments?' He replied: 'No, this is not for the purpose of further indictments, we didn't get the records prior to 1906.' I then said, 'No, you didn't get those records because they were burned in the fire, and I told you so at the time you were making your examination.'

The next day, August 7, 1913, Mr. Tidwell telephoned me and asked me to come down to his office, as there were some matters he wanted to talk over with me. After I got there he stated that the place the books were wanted was in his office, as 'it would be handiest to work on them there.'

On the next day, August 8, 1913, the following news item appeared in the San Francisco Examiner:

'JURY RESUMES FUEL CO. TRIAL. [78]
David C. Norcross, Secretary of Organization,
Examined by Prosecutor Roche.

The federal grand jury at its first meeting yesterday afternoon resumed the investigation of the alleged Western Fuel Company frauds. The government was represented by Theodore Roche, Esq., special prosecutor, and he spent a whole

hour examining David C. Norcross, Secretary of the Western Fuel Company.

It is understood that Special Prosecutor Roche has instituted further investigations of the Western Fuel Company to gather evidence to be used in the coming trial of the eight officials who were indicted on the charge of conspiracy.'

The contents of this item, as I am informed and believe and therefore state, were given out by, or with the consent of the Special Assistants to the Attorney General mentioned therein. I am further informed and believe and therefore state that this article correctly states their intention in having me subpoenaed before the Grand Jury.

On August 14, 1913, the subpoena specifically mentioned in the citation was served upon me. A copy of this subpoena is attached hereto and marked Exhibit 'A.' It will be observed from reading it that it does not state that there is any case or matter being investigated by the Grand Jury. It simply requires me to appear before the Grand Jury at 2 o'clock that afternoon and bring with me all the books and papers of the company of every description.

After consulting counsel I appeared before the Grand Jury at the appointed time, and gave the following answer:

'Counsel have instructed me that I am not required under [79] this subpoena, either to testify before the Grand Jury or to produce the books and papers of the Western Fuel Company. Accordingly, without any disrespect to the Grand Jury

I must decline to testify further or to produce the books until the Court has passed upon the matter.'

It seems to me that it would be unreasonable to expect the company to turn over all of its books, and especially at this time when the defendants have need of the books and are making continual and daily use of them in preparing for their oncoming trials.

I have been informed by counsel and upon information and belief I state that the range of this subpoena in calling for the production of every book and paper belonging to the company constitutes an unreasonable seizure.

I have been informed by counsel, and upon such information and belief state the fact to be that a Grand Jury has no right to institute a new or supplemental investigation in the hope of eliciting additional testimony to supplement or strengthen the testimony on which indictments have already been found, or in an attempt to aid the prosecutors in the trial of their case. Indictments should not have been returned in the first instance, unless there was sufficient evidence upon which to predicate them.

I do not believe there ever has been an intention of exhibiting these books or examining them in the presence of the Grand Jury or during its sessions, but I believe the fact to be, as I was informed by Mr. Tidwell, and I therefore state that what was really wanted of me was to turn the books over to Mr. Tidwell so that he might

work upon them at his office.

This citation was not served upon me until in the neighborhood of eleven o'clock last Saturday morning. There was [80] then no time left to subpoena witnesses. If any further proof is required as to the character and purpose of the investigation attempted by the Grand Jury I would ask for the issuance of forthwith subpoenas in order that oral testimony may be taken."

If your Honor would please follow the subpoena itself, which is attached to this affidavit, while I read a copy of it to you, it will be easier to see how broad and sweeping and general the range of the subpoena is.

"WE COMMAND YOU, that all business and excuses being laid aside, you appear before the Grand Jury of the United States of America, within and for the Northern District of California, at a District Court to be held in the United States courthouse, in the Postoffice Building, in the City and County of San Francisco, on the 14th day of August, 1913, at 2 o'clock in the afternoon, and that you produce before the said grand jury at the time and place aforesaid, the following":

We do not intend to stop to argue the matter at this time, if your Honor please, but parenthetically we would like to call your Honor's attention to the fact that no case or matter or investigation is specified or referred to in that subpoena.

"All books, papers, records and vouchers, of the Western Fuel Company, a corporation, in your pos-

session or under your control, showing the amount and weight of coal in the bunker of the Western Fuel Company situate on Folsom Street Dock in the City and County of San Francisco on the 1st day of January, 1904, including the amount of coal in the off-shore bunker and the amount of coal in the in-shore bunker, and also showing the amount and weight of coal on the 1st day of January, 1904, in the coal-yard of said Western Fuel Company connected with [81] said bunker by a tramway and situate on East Street, in said City and County of San Francisco, and also showing the amount and weight of all coal in all other bunkers, and places containing, or which contained coal of the Western Fuel Company, on the 1st day of January, 1904, in the State of California.”

We also want to call your Honor’s attention to the fact that all these demands relate back to January, 1904, notwithstanding the statement of the witness which he claims to have repeatedly made to Mr. Tidwell, that there are no such papers extant between 1904 and April, 1906.

“Also all books, papers, records and vouchers of said Western Fuel Company, in your possession or under your control, showing the total amount and weight of coal delivered from said bunker, including the off-shore bunker and the in-shore bunker and delivered from said yard, between the 1st day of January, 1904, and the date hereof.

Also all books, papers, records and vouchers of said Western Fuel Company, in your possession or under your control, showing the amount and

weight of coal on this date in said bunker of said Western Fuel Company, including said off-shore and said in-shore bunker, and in said yard.

Also all books, papers, records and vouchers of the Western Fuel Company, a corporation, in your possession or under your control, showing the amount and weight of coal in the bunker of the Western Fuel Company, situate on said Folsom Street Dock, on the 1st day of May, 1906, including the amount of coal in the off-shore bunker and the amount of coal in the in-shore bunker, and also showing the amount and weight of coal on the 1st day of May, 1906, in said coal-yard of said Western Fuel Company; and also showing the amount and weight of all coal in all other bunkers and places in the State of [82] California containing or which contained coal of the Western Fuel Company on the 1st day of May, 1906.

Also all books, papers, records and vouchers of said Western Fuel Company, in your possession or under your control, showing the total amount and weight of coal delivered from said bunker, including the off-shore bunker and the in-shore bunker, and delivered from said yard, between the 1st day of May, 1906, and the date hereof; also showing all coal delivered from any and all other bunkers and places containing, or which contained coal of the Western Fuel Company between the 1st day of January, 1904, and the date hereof; and also between the 1st day of May, 1906, and the date hereof.]

Also all books, papers, records and documents

of said Western Fuel Company, a corporation, in your possession or under your control, showing the weight of each load of coal taken from said in-shore and said off-shore bunker and out of said yard, and out of all other bunkers and places containing, or which contained coal of said Western Fuel Company, between the 1st day of January, 1904, and the date hereof; also showing the name of the person or persons to whom each of said loads of coal was sold or delivered, the date or dates upon which each of said loads of coal was so sold or delivered; and the amount charged to the person or persons to whom each of said loads of coal was so sold or delivered, and the amount paid for each of said loads of coal so sold or delivered.

Also all weekly, monthly and yearly financial and other reports made to the Directors of the Western Fuel Company, showing the financial condition of the affairs of said company; also the minute books of said company containing the minutes of the meetings of the Directors and the minutes of the meetings [83] of the stockholders of said company between the 1st day of January, 1904, and date hereof.

Also all stock ledgers, stock journals and stock certificate books showing the names of the various holders of shares of the capital stock of said Western Fuel Company on the 1st day of January, 1904, and at all times between January 1, 1904, and the date hereof.

Also all ledgers, cash-books and papers showing the expenses incurred and paid out by said West-

ern Fuel Company between the 1st day of January, 1904, and the date hereof, and to whom said payments were made.”

And next, if your Honor please, we want to read and offer just a brief supplementary affidavit by Mr. Norcross, which is as follows:

“I am not apprised by any grand juror or officer of the government or otherwise of the name of any of the parties with respect to whom I was called on to testify, or to produce books, papers or other documents, nor was I informed by anyone of the nature of the charge against any party before said grand jury.

Furthermore that it is and was impossible for me, or for any other officers or employee of said Western Fuel Company, to collect the books, papers and statements called for by said *subpoena duces tecum* within the time called therefor, said subpoena having been served upon me in the morning of August 14, 1913, and called for my appearance and production before said grand jury of said books, papers and statements that afternoon at 2 o'clock. And the fact is, as I have repeatedly stated to Mr. Tidwell, the books and papers of the company prior to April, 1906, were destroyed in the fire of April 18, 19 and 20, 1906.” [84]

And next we want to direct your Honor's attention to the concluding statement made by Mr. Norcross in his main affidavit wherein he says: “This citation was not served upon me until in the neighborhood of 11 o'clock last Saturday morning. There was then no time left to subpoena witnesses. If any

further proof is required as to the character and purpose of the investigation attempted by the grand jury I would ask for the issuance of forthwith subpoenas in order that oral testimony may be taken.”

I do not anticipate, however, if your Honor please, that there will be any further claim or any dispute upon that particular point. However, as the burden is really upon the Government in this matter and they are supposed to assume the burden of proof as we understand it, we would like to ask now what the evidentiary showing is that they have to offer in support of this citation that was served upon Mr. Norcross last Saturday morning.

Mr. KNIGHT.—And before that, if the Court please, we would like to make some little further showing here. I presume, Mr. Sullivan, it will be admitted that the Mr. Tidwell referred to in these affidavits is the Special Agent of the Treasury Department, and in charge of the collection of evidence used before the grand jury in these matters, and also in charge of the collection of evidence on behalf of the Government in these pending cases against the officers and employees of the Western Fuel Company.

Mr. SULLIVAN.—Yes, I will admit that.

Mr. KNIGHT.—Will it also be admitted, Mr. Sullivan, without the necessity of calling witnesses, that some ten days ago you stated to Mr. Warren Olney, Jr., in his office, that there were no further proceedings contemplated against the parties under indictment and connected with the Western Fuel Company? [85]

Mr. SULLIVAN.—I will state that I had a conversation with Mr. Olney about 10 days ago; in response to a statement made by him that he was inclined to advise the production of books that at that time while having a conversation with him the Government had no present intention of filing any further indictments against the Western Fuel Company or the defendants. That is correct, Mr. Olney, is it not?

Mr. OLNEY.—Yes, Mr. Sullivan, that was your statement to me.

Mr. SULLIVAN.—Yes, that we had then no present intention. You now claim for the first time that the time for compliance with the subpoena was too short, do you?

Mr. KNIGHT.—That is only one of our grounds.

Mr. SULLIVAN.—There was no such objection made when Mr. Norcross appeared before the Grand Jury.

Mr. KNIGHT.—We also ask to have your Honor consider in evidence the presentment of the grand jury, the citation that was served upon the Western Fuel Company and upon Mr. Norcross, and the subpoena, with the Marshal's return upon those papers.

Mr. SULLIVAN.—Mr. Knight, there was another subpoena served before that, one that was served on the 14th.

Mr. KNIGHT.—The one that preceded the 14th?

Mr. SULLIVAN.—Yes, there was one served on the 12th.

Mr. STANLEY MOORE.—Well, we can produce that.

Mr. SULLIVAN.—You will admit that there was a subpoena served on Mr. Norcross and the Western Fuel Company requiring the production of the books before the grand jury on the 12th day of August?

Mr. KNIGHT.—Yes.

Mr. SULLIVAN.—And that subpoena was substantially in the same form, so far as the production of the books and papers is [86] concerned as the subpoena of the 14th?

Mr. KNIGHT.—Well, I have not compared them, Mr. Sullivan.

Mr. STANLEY MOORE.—We will produce the subpoena.

Mr. SULLIVAN.—Very well.

Mr. KNIGHT.—There is a difference in that the present subpoena does not specify any proceeding pending before the grand jury. Will you admit that?

Mr. SULLIVAN.—No, we will not admit that.

Mr. KNIGHT.—We want to call Mr. Hanify with reference to questions as to whether there was anything pending before the Grand Jury at the time that subpoena was served on Mr. Norcross, and at the time that Mr. Norcross attended.

Mr. SULLIVAN.—We consider that showing immaterial, if your Honor please. How can the Grand Jury know what the Government intends to present?

Mr. KNIGHT.—What we want to show is that at the time that Mr. Norcross was served with a subpoena—I would suggest this, Mr. Sullivan, that you admit, subject to its materiality, that there was not

at the time of the service of the subpoena on August 14th and at the time Mr. Norcross appeared before the Grand Jury, or theretofore, and after the last indictment had been returned against the present defendants, any proceeding pending before the Grand Jury or any charge before the Grand Jury against these defendants, or any of them.

Mr. SULLIVAN.—I will admit that there was no formal charge pending before the Grand Jury at the time the subpoena was served upon Mr. Norcross; but to a certain extent there was a proceeding pending before the Grand Jury because Mr. Norcross had attended before the Grand Jury on two occasions before that, and he was sworn and questioned and testified to a certain extent. [87]

Mr. KNIGHT.—Mr. Sullivan was that proceeding anything further than merely a proceeding to obtain an examination of the books, papers and documents of the Western Fuel Company that are specified in the subpoena?

Mr. SULLIVAN.—In the first place, we consider that fact immaterial, and in the next place the Government is not called upon to disclose the intention which it had when it called upon Mr. Norcross to produce the books of the Western Fuel Company.

Mr. KNIGHT.—Of course, Mr. Sullivan, we don't ask you to waive any objection you may have as to the materiality or relevancy of that evidence. We merely want to get the fact before the Court as to the fact that there was no proceeding against these defendants or any of them pending, nor had any charge been made against these defendants or any

of them to the grand jury at the time of the service of these subpoenas and at the time the witness was called upon to testify in obedience to them.

Mr. SULLIVAN.—I will admit that at the time the subpoena was served there were no formal proceedings pending against the Western Fuel Company or against any of the defendants named in the indictment. That is as far as the Government will go. But I will state in good faith to counsel that there are other parties involved in these frauds who have not yet been indicted. And I will state that it is the intention of the Government to ascertain to what extent these other parties have been involved, and if their action is criminal, then the Government will take such course as it deems proper in the premises. But I frankly admit that when the subpoena was served the Government had and at that particular time any formal charges pending against the Western Fuel Company or against its directors, other than those charges which are now pending and appear in the indictments heretofore filed in this court. [88]

Mr. KNIGHT.—Of course, you refer to the formal charge. I don't know whether any distinction could be made as between a formal or an informal charge. My point is, and I ask you to admit it if it is the fact, that at this time there was no charge that had been presented by the District Attorney or by Special Counsel for the Government against the defendants under the present indictments, or any of them, and that no charge had been originated so far as you

know in the Grand Jury without the consent of the District Attorney.

Mr. SULLIVAN.—We will make that admission in so far as the Western Fuel Company and the present defendants are concerned. We will not make any admission as to any others, Mr. Knight.

Mr. STANLEY MOORE.—Is that all of your showing, Mr. Sullivan?

Mr. SULLIVAN.—We will stipulate, I suppose, as to the documentary evidence to go before the Court, Mr. Knight?

Mr. KNIGHT.—We want to offer, if the Court please, in connection with our case, the presentment of the Grand Jury against the Western Fuel Company and against Mr. D. C. Norcross; and we offer the citation and the subpoena served upon each of these parties, the citation which followed the presentment in each of these cases and the subpoena of the 14th of August—the *subpoena duces tecum* that was served upon each of these parties. Mr. Roche, have you the two Grand Jury subpoenas served on the 14th of August, and which called for the attendance of Mr. Norcross and the books of the Western Fuel Company?

Mr. SULLIVAN.—I assume, Mr. Knight, that the copies in your answer are correct?

Mr. KNIGHT.—Oh, yes, I think so.

Mr. SULLIVAN.—Then you may use those copies the same as the originals. [89]

Mr. KNIGHT.—All right.

Mr. ROCHE.—There will be no question at all about those copies.

Mr. SULLIVAN.—Mr. Knight, will you admit that the first subpoena was served upon Mr. Norcross and the Western Fuel Company on the 5th of August?

Mr. KNIGHT.—Yes. I think there is no question about that. There were various subpoena served, one on the 5th and one I think on the 12th and one on the 14th.

Mr. ROCHE.—There were only two subpoenas served—one on the 5th and Mr. Norcross was directed to return to the Grand Jury, and the other one was on the 14th.

Mr. STANLEY MOORE.—My recollection is that there were three subpoenas served, the one on the 5th, and that was not quite so *omnibus* in its requirements as the next one which followed that; and then there was one on the 14th, and then there was one intermediate between the 5th and the 14th.

Mr. ROCHE.—That is correct, yes, because Mr. Norcross did testify at the first session that he did have these records in his possession covering the period between January, 1904, and the date of the fire; that testimony was subsequently modified.

Mr. STANLEY MOORE.—If that is so, Mr. Roche, I think you had better make an evidentiary showing as to that fact because I think you will find you are entirely mistaken in regard to it.

Mr. SULLIVAN.—Before making that showing we will ask counsel to admit that Mr. Norcross as the Secretary of the Western Fuel Company appeared before the Grand Jury on the 12th and read before

the Grand Jury a statement which I now hold in my hand. [90]

Mr. KNIGHT.—Mr. Sullivan, I understand that at that time the *subpoena duces tecum* was directed to Mr. Norcross himself. It was your subpoena of the 14th that named the Western Fuel Company as the party to produce the books. We admit that he did make that statement to the Grand Jury on the 12th and again on the 14th.

Mr. SULLIVAN.—It is admitted then by the Respondent that on the 12th day of August, Mr. D. C. Norcross, the Secretary of the Western Fuel Company appeared before the Grand Jury as such Secretary and read the following paper:

“I have been instructed by counsel that I am not obliged under this subpoena to testify before the Grand Jury or to produce the books and papers of the Western Fuel Company accordingly, and without any disrespect to the Grand Jury, I must decline to testify further or to produce the books and papers until the Court has passed upon the matter.”

It is also admitted that upon the 14th day of August, in obedience to a subpoena directed to D. C. Norcross as the Secretary of the Western Fuel Company and a subpoena directed to the Western Fuel Company, Mr. Norcross again appeared before the Grand Jury and was then sworn; that thereupon after having been sworn, he produced the same paper which I have just read declining to testify before the Grand Jury or to produce the books or papers until the Court passed upon the matter.

Mr. KNIGHT.—That is admitted.

Mr. SULLIVAN.—It is admitted, I suppose, that D. C. Norcross is still the Secretary of the company?

Mr. KNIGHT.—That is admitted.

Mr. SULLIVAN.—And I understand it is stated in the answer that as such Secretary he has the custody and possession of all the books and papers?
[91]

Mr. STANLEY MOORE.—Do you want us to admit, Mr. Sullivan, that all of the statements contained in the affidavits are true?

Mr. SULLIVAN.—Oh, no. There is considerable immaterial matter in the affidavit which, of course, we will ask the Court to ignore in passing upon the question.

It is admitted that the Secretary has in his possession and under his control those papers which were not destroyed by the fire in 1906?

Mr. KNIGHT.—Yes, that is correct.

Mr. SULLIVAN.—As well as the papers of defendant corporation that have been kept since the year 1906, since the fire.

Mr. KNIGHT.—Yes.

Mr. SULLIVAN.—Well, it seems to me, if your Honor please, that that brings the matter down to a question of law and not a question of fact. We are ready to proceed and argue the questions of law.

Mr. KNIGHT.—We are ready.

Mr. SULLIVAN.—Inasmuch as they make these legal objections, if your Honor please, to the sufficiency of the subpoena and the regularity of these proceedings, and inasmuch as it appears that Mr.

Norcross the Secretary did, in obedience to the subpoena appear before the Grand Jury and refuse to submit the books, we submit that they must have a showing to justify the conduct of the Respondent Norcross and the conduct of the Western Fuel Company.

Mr. STANLEY MOORE.—If your Honor please, Mr. Hanify, the foreman of the Grand Jury, is in attendance now and we do not like to ask that he remain here. I think that perhaps it would save time to remove some of these questions about which argument might be made if we should just put him on the stand and let him go [92] his way.

Mr. SULLIVAN.—What do you want to prove by him?

Mr. STANLEY MOORE.—I will call him to the stand and ask him the questions. I want to prove by him, that, as a matter of fact, there was no investigation of any kind pending before the Grand Jury; that this gentleman was just subpoenaed there to produce these books and papers, and there was no idea of an indictment. The idea was that you should get possession of them, or rather, Mr. Tidwell, in order that he could work on them, just as he told Mr. Norcross down in the office that day. If there is going to be any dispute about that, or any dilly-dallying or splitting of hairs as to whether there were supposedly some mysterious person who might be indicted, some person on the stock books or on the ledgers, we want to get that matter behind us.

Mr. ROCHE.—Well you don't mean to say that Mr. Hanify is in a position to say that any indict-

ments were pending against any people other than as against any officials of the company, do you? He certainly has not given you that information.

Mr. STANLEY MOORE.—Well, Mr. Roche, we know what you have said; we know what you have said in that interview of yours in the “Examiner.” And we know what Mr. Sullivan said down in Mr. Olney’s office, that no further indictments were contemplated. We also know what Mr. Tidwell said, that this was not a matter of further indictment. Now, to remove any possibility of doubt about it, and in order that this Court may act without any doubt upon the matter at all, and in so far as this can be determined as a question of law, we would like to call the remaining factor and prove by the spokesman of the Grand Jury that there was no further idea of indictments in so far as this proceeding was concerned. As long as there is a disposition here, for the purposes [93] of this argument, to say that the Grand Jury might have been looking into these books for the purpose of indicting additional persons, we want to set that at rest.

Mr. SULLIVAN.—You want to prove by him that so far as he is personally concerned he did not know of any such procedure?

Mr. STANLEY MOORE.—Precisely.

Mr. SULLIVAN.—He cannot speak for the Government or for the other Grand Jurors, can he?

Mr. STANLEY MOORE.—No. I think in a measure he could speak for the other Grand Jurors, he being the foreman and the head of the Grand Jury.

But if you will admit that Mr. Hanify, if produced upon the stand, would testify, subject to your objections, that this matter was brought before the Grand Jury in the way of this subpoena and these papers brought up here, at their first session without any idea so far as he was concerned, or other members of the grand jury, so far as his knowledge and information is concerned, of preferring any other indictments but simply to enable you gentlemen, or the special agents, to check over these books, then there will be no occasion for calling him.

Mr. SULLIVAN.—We won't make the last admission.

Mr. STANLEY MOORE.—Mr. Hanify, will you step forward, please.

JOHN R. HANIFY, called and sworn:

Mr. STANLEY MOORE.—Q. Your name is John R. Hanify? A. Yes, sir.

The COURT.—What do you wish to show by this witness other than what counsel has expressed a willingness to admit?

Mr. STANLEY MOORE.—Your Honor, it is a very slight difference. [94] I do not see why there should be any difficulty among counsel in agreeing upon the facts of this case. I suppose to show, if your Honor, please, that there was no investigation of any kind in so far as the foreman of the Grand Jury was aware of at the time that this subpoena was issued and the production of these books was called for.

The COURT.—Counsel has expressed a willing-

ness to admit that.

Mr. SULLIVAN.—We admit that.

Mr. STANLEY MOORE.—And there was no idea, so far as the foreman of the Grand Jury is aware, of preferring further indictments against anyone at this time.

Mr. SULLIVAN.—So far as he knows?

Mr. STANLEY MOORE.—Yes.

Mr. SULLIVAN.—We admit that. We did not apply to him.

The COURT.—Counsel has admitted everything the witness might testify to:

Mr. STANLEY MOORE.—Will it be admitted, further than that, that if such a matter had been taken up with the Grand Jury, they would have been appraised of that fact through the medium of their foreman?

Mr. SULLIVAN.—Certainly not.

Mr. STANLEY MOORE.—Then there is some disposition, or apparently there might be an argument made here as to the sufficiency of this proof. We have called for the most appropriate member of the Grand Jury we could think of. The matter is immaterial to us except so far as the question of time is concerned.

The COURT.—I understand that, but it seems to me they have admitted everything that this witness can with any reason be expected to know. I do not desire to shut you off from any showing you wish to make. I cannot conceive of anything this [95] witness can testify to that has not been admitted by counsel. Counsel has admitted that so far as this witness is

concerned all that you claim is true.

Mr. STANLEY MOORE.—Mr. Sullivan, would you make this admission, simply as going to the completeness of our evidence here a showing in this behalf, the foreman of the Grand Jury being here available; will you admit that as to the remaining members of the Grand Jury there was no statement by you that the Government desired the Grand Jury to take up or consider an investigation having in view the presentation of further indictments as against these defendants or any other individuals connected with the Western Fuel Company?

Mr. SULLIVAN.—Yes, we will admit that. That is correct.

Mr. KNIGHT.—Q. Mr. Hanify, at all times mentioned in these subpoenas you were the foreman of the Grand Jury and in attendance and presided over its deliberations?

Mr. SULLIVAN.—It seems to me our admissions are very broad and complete. I do not think it is necessary to go into the secrets of the Grand Jury. I don't think this witness has a right to testify.

The COURT.—Yes, it has been assumed that he was the foreman of the Grand Jury.

Mr. KNIGHT.—And that he was in attendance?

Mr. SULLIVAN.—Yes, that he was in attendance.

The COURT.—You may now proceed with your arguments.

(Here followed the arguments on the law by the respective counsel.)

[Endorsed]: Petition. Filed September 10, 1913.
W. B. Maling, Clerk. [96]

In the District Court of the United States, in and for the Northern District of California, First Division.

In the Matter of Application of DAVID C. NORCROSS, for Writ of Habeas Corpus.

Order Denying Application for Writ of Habeas Corpus.

Upon reading and filing the application of the above-named David C. Norcross for writ of *habeas corpus*, and due cause therefor appearing, IT IS HEREBY ORDERED that said application be and the same is hereby denied.

Dated September 10th, 1913.

M. T. DOOLING,
Judge.

[Endorsed]: Filed Sep. 10, 1913. W. B. Maling, Clerk. By Lyle S. Morris, Deputy Clerk. [97]

In the District Court of the United States, in and for the Northern District of California, First Division.

In the Matter of Application of DAVID C. NORCROSS, for Writ of Habeas Corpus.

Petition for Appeal.

The said David C. Norcross, by his attorneys, Samuel Knight and Stanley Moore, feeling himself aggrieved by the order and judgment entered on the 10th day of September, 1913, in the above-entitled proceeding, does hereby appeal from said order to the Circuit Court of Appeals for the Ninth Circuit,

and prays that his appeal may be allowed and that a transcript of the record and proceedings and papers upon which said order is made, duly authenticated, may be sent to the said Circuit Court of Appeals for the Ninth Circuit of the United States.

SAMUEL KNIGHT,

STANLEY MOORE,

Attorneys for David C. Norcross.

[Endorsed]: Filed Sep. 10, 1913. W. B. Maling, Clerk. By Lyle S. Morris, Deputy Clerk. [98]

In the District Court of the United States, in and for the Northern District of California, First Division.

In the Matter of Application of DAVID C. NORCROSS, Respondent, for Writ of Habeas Corpus.

Assignment of Errors.

The respondent in this action, in connection with its appeal herein, makes the following assignment of errors, in the decision of said District Court:

1. The Court erred in rendering and entering its final judgment and order adjudging said respondent to be in contempt of said court and imposing imprisonment therefor.

2. The Court erred in holding and deciding that it had jurisdiction to make and enter the final judgment and order hereinbefore referred to.

3. The Court erred in holding and deciding that the presentments of the Grand Jury herein, or either of them, stated facts sufficient to authorize the said

Court to adjudge said respondent herein to be guilty of contempt of said court.

4. The Court erred in not holding and deciding that said respondent was not guilty of contempt of said court.

5. The Court erred in not holding and deciding that it had no jurisdiction under the Constitution and Laws of the United States, by reason of any of the matters or things contained and set forth in said presentments or reports of said Grand Jury, or either [99] of them, to entertain any charge or charges of contempt against said respondent.

6. The Court erred in holding and deciding that there was a cause, action or charge of any kind against any party whatsoever, before said Grand Jury, at any of the times set forth in said presentments or either of them or at the time said respondent appeared before said Grand Jury, and in holding that there was such a cause, action or investigation then pending before said Grand Jury, as entitled the latter to require said respondent to testify or give evidence or produce before said body any books, papers or documents that were called for by it.

7. The Court erred in not holding and deciding that said Grand Jury was not in the exercise of its proper and legitimate authority in prosecuting the alleged investigation set out in said presentments to said Grand Jury, and in seeking to compel said respondent to give evidence before it or to produce before it said books, papers and other documents named in the *subpoena duces tecum* theretofore served upon this respondent.

8. The Court erred in not holding and deciding that at all of the times mentioned in said presentments or either of them and at the time said respondent was required to appear before said Grand Jury, and requested to then and there testify and produce said books, papers or other documents, there was no specific charge against any particular person, firm, association or corporation, nor any specific charge against any person, firm, association or corporation then unknown, nor charge against any specific person, firm, association or corporation, and that there was then and there no presentment, indictment or any other charge against any person, firm, association or corporation, pending before said Grand Jury, either initiated by it of its own knowledge, or on information obtained by it, or upon [100] the knowledge or information obtained by any of its members, or instituted by the United States, or by anyone acting on its behalf, and in further not holding and deciding that at such time said Grand Jury had no reason to believe that a crime had been committed, for which said Grand Jury had not presented an indictment against all persons, firms, associations or corporations alleged or believed to have committed said crime or to have been connected therewith.

9. The Court erred in not holding and deciding that inasmuch as this respondent, at the time he attended before said Grand Jury and was examined and requested to produce said books, papers or other documents, as aforesaid, was not apprised of the name or names of any party with respect to whom

he was being called to testify or to produce said books, papers or other documents, and inasmuch as he was not informed of the nature of the charge pending against any person, firm, association or corporation, and inasmuch as he was not advised that any cause, proceeding or investigation whatsoever was pending before said Grand Jury at said time, against any party whatsoever, he was not compelled to testify thereat, nor to produce any of said books, papers, or other documents, and was not in contempt of court in failing to so testify and to produce said books, papers or other documents.

10. The Court erred in not holding and deciding that the *subpoena duces tecum* which was served upon this respondent on the 14th day of August, 1913, was and is invalid inasmuch as it did not specify that any cause, proceeding or investigation was then pending before said Grand Jury, or that he was required to testify and produce said books, papers and other documents before said Grand Jury in any action, proceeding or investigation whatsoever then pending before it.

11. The Court erred in not holding and deciding that this respondent was not obliged to obey said *subpoena duces tecum* [101] inasmuch as there was no order made by any Judge of said District Court or other Judge for the issuance of said *subpoena duces tecum*, and inasmuch as no application therefor was ever made to said or any Judge.

12. The Court erred in not holding and deciding that said *subpoena duces tecum* constituted and constitutes a violation of the Fourth Amendment to the

Constitution of the United States and of this respondent's right thereunder to be secure in his person, house, papers and books against unreasonable search and seizure.

13. The Court erred in not holding and deciding that said *subpoena duces tecum* constituted and constitutes in effect a warrant and search for and seizure of the papers therein mentioned, and not being issued upon probable cause or supported by oath or affirmation, and failing utterly to describe the place to be searched or the things to be seized constituted and constitutes a violation of said Fourth Amendment.

Wherefore this respondent prays that the judgment of said District Court may be reversed.

SAMUEL KNIGHT,

STANLEY MOORE,

Attorneys for Defendant.

[Endorsed]: Filed Sep. 10, 1913. W. B. Maling, Clerk. By Lyle S. Morris, Deputy Clerk. [102]

In the District Court of the United States, in and for the Northern District of California, First Division.

In the Matter of Application of DAVID C. NORCROSS, for Writ of Habeas Corpus.

Order Allowing Appeal and Admitting Petitioner to Bail.

Now, to wit, on the 10th day of September, 1913,
IT IS ORDERED that the appeal of the hereinbe-

fore mentioned David C. Norcross in the above-entitled matter be allowed as prayed for, and it is further ordered that said petitioner, David C. Norcross, at any time pending said appeal, be enlarged upon executing a recognizance with sureties in the sum of Five Thousand Dollars, to the satisfaction of the clerk of this court, for his appearance to answer the judgment of the Circuit Court of Appeals for the Ninth Circuit, and upon failure thereof to give appeal, remain in the custody of the United States Marshal.

M. T. DOOLING,
District Judge.

[Endorsed]: Filed Sep. 10, 1913. W. B. Maling, Clerk. By Lyle S. Morris, Deputy Clerk. [103]

In the District Court of the United States, in and for the Northern District of California, First Division.

In the Matter of the Application of DAVID C. NORCROSS, for Writ of Habeas Corpus.

Citation on Appeal—Copy.

The United States of America,—ss.

To the United States, Greeting:

WHEREAS the above-named David C. Norcross has lately appealed to the United States Circuit Court of Appeals for the Ninth Circuit from an order made in the above-entitled matter on the 10th day of September, 1913, by the District Court of the United States for the Northern District of California, First Division;

You are therefore hereby cited to appear before said United States Circuit Court of Appeals, Ninth Circuit, at the City and County of San Francisco, State of California, on the ninth day of October next, to do and receive what may appertain to justice to be done in the premises.

Given under my hand at the City and County of San Francisco, State of California, in the Ninth Judicial Circuit, this 10th day of September, 1913.

M. T. DOOLING,

Judge of the District Court of the United States, for the Northern District of California.

[Endorsed]: Filed Sep. 10, 1913. W. B. Maling, Clerk. By Lyle S. Morris, Deputy Clerk. [104]

In the District Court of the United States, in and for the Northern District of California, Division No. 1.

In the Matter of Application of DAVID C. NORCROSS, for Writ of Habeas Corpus.

Bond on Appeal.

KNOW ALL MEN BY THESE PRESENTS: That we, David C. Norcross, as principal, and Globe Indemnity Company, a corporation of the State of New York, as surety, are held and firmly bound unto the United States, appellee herein, in the full and just sum of Five Hundred (\$500) Dollars, to be paid to the said appellee, its certain attorneys and assigns, to which payment, well and truly to be made, we bind ourselves, our heirs, executors and adminis-

trators, successors and assigns jointly and severally by these presents.

Sealed with our seals and dated this 10th day of September, 1913.

Whereas, lately, at a District Court of the United States, in and for the Northern District of California, Division No. 1 in a suit or proceeding depending in said court between said appellant and appellee, a judgment was rendered against said appellant, David C. Norcross, and said appellant having duly appealed to the United States Circuit Court of Appeals for the Ninth Judicial Circuit to [105] reverse the judgment in the aforesaid suit, and a citation directed to the said United States citing and admonishing it to be and appear at a session of the said United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the City and County of San Francisco, State of California, in said Circuit, on the ninth day of October next.

Now, the condition of the above obligation is such that if the said appellant, David C. Norcross, shall prosecute said appeal to effect and answer all damages and cost, if it fail to make the said plea good, then the above obligations to be void; else to remain in full force and virtue.

DAVID C. NORCROSS,

GLOBE INDEMNITY COMPANY,

By JOY LICHTENSTEIN,

Attorney in Fact.

Approved by

[Seal]

M. T. DOOLING,
Judge.

O.K.—M. I. SULLIVAN,
THEO. J. ROCHE.

Sept. 10, 1913.

Acknowledged before me the day and year first
above written.

W. B. MALING, [Seal]
United States Commissioner for the Northern Dis-
trict of California.

[Endorsed]: Filed Sep. 10, 1913. W. B. Maling,
Clerk. By Lyle S. Morris, Deputy Clerk. [106]

*In the District Court of the United States, in and
for the Northern District of California, First
Division.*

No. 15,462.

In the Matter of Application of DAVID C. NOR-
CROSS, for Writ of Habeas Corpus.

No. 5,325.

UNITED STATES,

Plaintiff,

vs.

DAVID C. NORCROSS,

Defendant.

No. 5,324.

UNITED STATES,

Plaintiff,

vs.

WESTERN FUEL COMPANY, a Corporation,
Defendant.**Stipulation Re Evidence on Appeal.**

IT IS HEREBY STIPULATED by and between the parties hereto, and their respective counsel, that the record of the above-entitled case No. 15,462 may be deemed to be the complete record in the above-entitled cases No. 5,325 and No. 5,324, and that the writ of error in each of the two cases last mentioned may be heard and decided upon the record presented in the case No. 15,462 first above entitled, unless otherwise ordered by the Circuit Court of Appeals.

IT IS FURTHER STIPULATED THAT the said petition for writ of *habeas corpus*, with its respective exhibits attached thereto in said case No. 15,462, and the order denying same, together with the [107] appeal, order allowing same and providing for bond, assignment of errors and citation constitute the entire record on appeal therein, and on which the said District Court acted, and include all papers, testimony and proceedings in said case No. 15,462 filed, taken and had in this court, and that said appeal may be heard and decided upon the said record, papers, testimony and proceedings as so presented, without the necessity of issuance of writ of

certiorari by said Circuit Court of Appeals, or other means of bringing said record to said Circuit Court of Appeals.

Executed in triplicate.

MATTHEW I. SULLIVAN,
THEO. J. ROCHE,

Special Assistants Attorney General for United States, Respondent Herein.

SAMUEL KNIGHT,
STANLEY MOORE,

Attorneys for D. C. Norcross and Western Fuel Company, Appellant and Plaintiffs in Error, Respectively.

So ordered.

M. T. DOOLING,
District Judge.

15 October, 1913.

[Endorsed]: Filed Oct. 15, 1913. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [108]

In the District Court of the United States, in and for the Northern District of California, First Division.

No. 15,462.

In the Matter of Application of DAVID C. NORCROSS, for Writ of Habeas Corpus.

Order Extending Time to File Record, etc.

Good cause therefore appearing, it is, on motion of Samuel Knight, one of the attorneys for the petitioner above named,

ORDERED that the time of said petitioner within

which to file and docket the record in the Circuit Court of Appeals on his appeal herein is hereby extended from October 9th to and including October 15th, 1913.

Dated San Francisco, California, October 8th, 1913.

M. T. DOOLING,
Judge.

[Endorsed]: Filed Oct. 8, 1913. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [109]

In the District Court of the United States, in and for the Northern District of California, First Division.

No. 15,462.

In the Matter of the Application of DAVID C. NORCROSS, for Writ of Habeas Corpus.

Order Extending Time in Which to File Transcript on Appeal.

Good cause appearing therefor, it is hereby ordered that the Clerk of the above-entitled court have further time in which to prepare the transcript on appeal in the above-entitled case, to wit, to and including the 18th day of October, 1913.

Dated: San Francisco, October 15, 1913.

M. T. DOOLING,
United States District Judge.

[Endorsed]: Filed Oct. 15, 1913. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [110]

In the District Court of the United States, in and for the Northern District of California, First Division.

In the Matter of Application of DAVID C. NORCROSS, for Writ of Habeas Corpus.

Admission of Service of Petition, etc.

Receipt of the following papers herein is hereby admitted, this 13th day of September, 1913.

Petition for writ of *habeas corpus*.

Order denying writ of *habeas corpus*.

Appeal from order denying writ of *habeas corpus*.

Citation.

Assignment of Errors.

Order Allowing Appeal and Fixing Amount of Bail Bond.

Cost Bond and Bail Bond.

Dated: San Francisco, Cal., September 13th, 1913.

M. I. SULLIVAN,

THEO. J. ROCHE,

Per A. M. J.,

Assistant Attorneys General.

[Endorsed]: Filed Sep. 16, 1913. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [111]

Certificate of Clerk U. S. District Court to Transcript of Record on Appeal.

I, Walter B. Maling, Clerk of the District Court of the United States, for the Northern District of California, do hereby certify the foregoing 111 pages, numbered from 1 to 111, inclusive, contain a full,

true and correct transcript of the record, proceedings and files "In the Matter of the Application of David C. Norcross for Writ of Habeas Corpus," number 15,462, as the same remain of record and on file in the office of the Clerk of said District Court; prepared in accordance with the praecipe of the attorney for appellant, a copy of which praecipe is contained in the foregoing record.

Annexed hereto is the original Citation on appeal herein.

I further certify that the cost of preparing and certifying this record amounts to the sum of \$55.10; and that the same has been paid by the attorney for appellant.

In witness whereof, I have hereunto set my hand and affixed the seal of said District Court, this 18th day of October, A. D. 1913.

[Seal] WALTER B. MALING,
Clerk United States District Court, Northern Dis-
trict of California.

By Lyle S. Morris,
Deputy Clerk. [112]

[Citation on Appeal (Original).]

*In the District Court of the United States, in and
for the Northern District of California, First
Division.*

In the Matter of the Application of DAVID C.
NORCROSS for Writ of Habeas Corpus.

The United States of America,—ss.

To the United States, Greeting:

WHEREAS, the above-named David C. Norcross has lately appealed to the United States Circuit Court of Appeals for the Ninth Circuit from an order made in the above-entitled matter on the 10th day of September, 1913, by the District Court of the United States for the Northern District of California, First Division;

You are therefore hereby cited to appear before said United States Circuit Court of Appeals, Ninth Circuit, at the City and County of San Francisco, State of California, on the ninth day of October next, to do and receive what may appertain to justice to be done in the premises.

Given under my hand at the City and County of San Francisco, State of California, in the Ninth Judicial Circuit, this 10th day of September, 1913.

M. T. DOOLING,

Judge of the District Court of the United States for
the Northern District of California. [113]

[Endorsed]: No. 15,462. In the District Court of the United States, Northern District of California, First Division. In the Matter of the Application of

David C. Norcross, for Writ of *Habeas Corpus*. Citation. Filed Sep. 10, 1913. W. B. Maling, Clerk. By Lyle S. Morris, Deputy Clerk. [115]

[Endorsed]: No. 2329. United States Circuit Court of Appeals for the Ninth Circuit. David C. Norcross, Appellant, vs. The United States of America, Appellee. In the Matter of the Application of David C. Norcross for a Writ of *Habeas Corpus*. Transcript of Record. Upon Appeal from the United States District Court for the Northern District of California, First Division.

Received and filed October 18, 1913.

FRANK D. MONCKTON,
Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

By Meredith Sawyer,
Deputy Clerk.

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IN THE
United States Circuit Court of Appeals
For the Ninth Circuit

DAVID C. NORCROSS,	}	No. 2329
vs.		
UNITED STATES OF AMERICA,		
	<i>Appellant,</i>	
	<i>Appellee.</i>	

In the Matter of the Application of David
C. Norcross for Writ of Habeas Corpus.

DAVID C. NORCROSS,	}	No. 2328
vs.		
UNITED STATES OF AMERICA,		
	<i>Plaintiff in Error,</i>	
	<i>Defendant in Error.</i>	

WESTERN FUEL COMPANY	}	No. 2327
(a corporation),		
	<i>Plaintiff in Error,</i>	
	<i>Defendant in Error.</i>	

ORAL ARGUMENT OF SAMUEL KNIGHT.

May it please the Court:

In this case appellant, who was secretary of Western Fuel Company, was adjudged guilty of contempt of the

court below in refusing to produce the books, records and papers of the Western Fuel Company in response to a subpoena *duces tecum* which had been theretofore served upon him, and of an order of the court subsequently made in pursuance of such subpoena commanding him to produce these documents.

After the court had adjudged appellant guilty of contempt of court and had sentenced him to be imprisoned until he should have produced the books, papers and documents called for by the subpoena *duces tecum*, appellant petitioned the same court for a writ of habeas corpus, which was denied, and from the order denying such application he has taken an appeal to this court. He has also prosecuted a writ of error from the final order or judgment adjudging him to be in contempt of court.

At the same time and for similar reasons the Western Fuel Company was also adjudged guilty of contempt of court for refusing to produce the same books, papers and other documents, and was sentenced to pay a fine of \$2000. From this final judgment or order the Western Fuel Company has also prosecuted a writ of error to this court.

Inasmuch, however, as these cases were heard together in the court below, it has been stipulated by counsel for all parties that, unless this court shall direct otherwise, the record of the case which comes to this court on appeal and which has been printed and is in the hands of the court might be deemed to be the complete record in each of the cases in which a writ of

error was taken, and that the writ of error in each of the two cases last mentioned might be heard and decided upon the printed record.

Inasmuch as the petition for writ of habeas corpus, together with its exhibits, sets forth all of the proceedings taken before the court below, including all orders made and testimony taken and matters presented by the grand jury, as well as the subpoena *duces tecum* itself, it was further stipulated that this petition for the writ of habeas corpus with its exhibits, and the order denying the petition, together with the papers necessary to perfect the appeal, constituted the entire record of the case upon which the court below acted, and that the appeal might be heard and decided upon this record without the necessity of the issuance of a writ of *certiorari* to bring the record to the court of appeals.

It may be remarked, parenthetically, that the various methods adopted here for review of these cases have been employed recently in similar cases before the Supreme Court of the United States, e.g., in *Wilson v. United States*; *Wheeler v. Same*; *Shaw v. Same*; to all of which attention will be hereafter called in another connection; a writ of error, as the court knows, bringing up matters for review which could not be reached by an appeal from an order denying a writ of habeas corpus. But we believe that the action of the learned court below complained of by us can be re-examined here almost as effectively under the one procedure as under the other, inasmuch as it is our contention that the trial court lacked jurisdiction to make the order or

judgment in question, and lacked jurisdiction to punish either appellant and plaintiff in error Norcross, or plaintiff in error Western Fuel Company, for his and its refusal to produce the books, records and other papers called for by the subpoena *duces tecum*.

However, such errors as we complain of that cannot be examined by this court on appeal can be corrected under the writ of error taken in the Norcross case, and also in the case of the Western Fuel Company; so that it is really immaterial whether or not the learned court below lacked jurisdiction to enforce the subpoena *duces tecum*, or merely erred in sustaining it and in finding plaintiff in error guilty of contempt under the presentment of the grand jury and citation issued in pursuance thereof. For that reason we will discuss the cases together without regard to the method by which this court may review the action of the court below.

THE RECORD.

The further facts of the case as disclosed by the record are these: On the 14th day of August, 1913, appellant Norcross, who was and is secretary of Western Fuel Company, was served in his official capacity as such secretary with a subpoena *duces tecum* commanding him to produce before the grand jury, at 2 o'clock in the afternoon of that day, virtually all of the books, records, papers and vouchers of Western Fuel Company showing the business done by that company from the first day of January, 1904,—virtually when it commenced business,—and first day of May, 1906, respectively, to the date of the subpoena; also all the

weekly, monthly and yearly financial and other reports made to the directors of the Company, minute books containing the minutes of the meetings of directors, minutes of meetings of stockholders between the first day of January, 1904, and the date of the subpoena; also all the stock ledgers, stock journals, ledgers, stock certificate books and cash books showing the business transacted between these dates. As I shall shortly show, the demand thus made covered virtually all of the records of every character possessed by the Western Fuel Company and covering its entire business for the past eight or ten years, and was, therefore, most sweeping in character. The subpoena did not allege that there was any proceeding whatsoever pending before the grand jury, and, in fact, before appellant attended before the grand jury he was told by a special agent of the treasury department, who had in charge the investigation which had resulted in the indictment of various directors and officers of the Western Fuel Company, that the demand for these records was not made for the purpose of bringing further indictments, but only because the government did not get the company's records prior to 1906; and in an apparently authorized newspaper interview one of the special counsel for the government stated that the object of the proceeding before the grand jury was "to gather evidence to be used in the coming trial of the eight officials who were indicted on the charge of conspiracy." The company had previously furnished the government with all of its records which the latter had asked for. It will further appear as a fact that no

proceeding was then pending before the grand jury either presented to it by the district attorney or by special counsel for the government, or initiated by the grand jury of its own motion, and no order or application of any kind had ever been made to any member of the court below for the subpoena in question, or for any subpoena *duces tecum* calling for the production of any of these books, papers or records.

The true reason for the government's desire to obtain these papers and records of the Western Fuel Company is found in the fact that in the November, 1912, term of court two indictments had been presented against the officers and certain employes of the Western Fuel Company, and a third indictment had been presented during the March, 1913, term of court, all of these indictments being virtually identical, the first indictment charging conspiracy to defraud the United States formed on the first day of January, 1904, the second indictment charging the same offense, dating the conspiracy from the first day of April, 1906, and the third and last indictment charging the same offense, dating the conspiracy from the first day of April, 1906; and this last indictment was apparently also designed to correct the former indictments in some respects. And at the time appellant was served with the subpoena *duces tecum* the trial of the defendants under one of the indictments had been set for less than two weeks later, i.e. the 26th day of August, 1913.

The court will particularly note this date as bearing with considerable importance upon the reasonableness

of the grand jury's demand. At the instigation probably of the special agent of the treasury department, at least by some official connected with the case, the grand jury postponed this mysterious investigation to which special counsel for the government referred (page 92 of the record) until just before the trial under one of the indictments was to take place, when this dragnet inquiry was instituted apparently for no other purpose than not only to furnish the government with whatever ammunition the books and documents might supply, but also to keep the defendants from properly preparing their case by taking from them their own records when they were most needed.

At the time last mentioned the trial was further postponed until the 13th day of October, 1913, and since that time the trial of the case has been further continued, at the instance of the prosecution, until the first day of next December, for the avowed purpose of obtaining, if possible, a decision of this court on the matter now under consideration prior to the time when the case would be reached for trial. The court will recall that when application was made by the government's counsel on the day the record was filed in this court to have this case heard before the present term expired, it was stated as the reason for the application that the trial of the case in the district court had been postponed to await the determination by this court of the matter now under consideration; and when the government made its application for continuance of the case from the 13th of October, it was given as a reason not only that the engagements of the government's

counsel were such as to make it inconvenient to try the case at the time last named, but also that it required for preparation of its case the books and papers of the Western Fuel Company which the latter and its secretary had refused to produce.

It may be further said that a subpoena *duces tecum* has been served upon appellant to produce the books, papers and records of the Western Fuel Company at the time of the trial, and it has been repeatedly stated to the court below and to counsel that the papers and records thus called for would be here in San Francisco and accessible upon proper process at that time.

The court will bear in mind that this is an application to have these records produced, not before the trial court, but before the grand jury, in order to enable the government by a fishing expedition to endeavor, if possible, to strengthen its case, as it is apparently entirely dissatisfied with the case that had been heretofore presented to the grand jury.

Acting under the advice of counsel, appellant, while personally attending before the grand jury, and after being sworn, declined to comply with the demand contained in the subpoena *duces tecum*. He assigned a general reason for his refusal, which the Supreme Court of the United States has held in *Hale v. Henkel*, to which attention will be hereafter directed, entitles him to rely upon whatever legal rights he has. The matter was presented by the grand jury to the learned court below on the afternoon of the 14th of August, and on this presentment or report a

citation was issued and served upon appellant on the 16th of August commanding him, as secretary of the Western Fuel Company, to show cause on the 18th of August why he should not be adjudged guilty of contempt of court in failing to comply with the demand above referred to. At the date last mentioned appellant showed cause why he should not produce these books, papers and records not only by two affidavits of his which were read in evidence, but also by certain admissions made by special counsel for the government, who are conducting this case, by the subpoena itself, by the presentment of the grand jury upon which the citation was issued, and by the testimony of the foreman of the grand jury, to all of which I will more particularly call the court's attention in discussing the grounds upon which we believe appellant was justified in refusing to obey the subpoena *duces tecum*. The learned court below, however, held appellant's showing to be insufficient and directed him to produce the books, papers and records in question, and for the latter's continued refusal so to do, adjudged him guilty of contempt and directed that he be imprisoned in the county jail of Alameda County until he obey the subpoena in question.

For similar reasons and at the same time and by the same proceeding the Western Fuel Company was adjudged guilty of contempt and fined in the sum of \$2000 for failing to produce the same books, papers and records; and, as before stated, with the consent of the court, the rule made applicable in the case of

Norcross will also govern the case of the Western Fuel Company.

Points and Authorities.

We contend that the learned court below was without jurisdiction to adjudge appellant guilty of contempt of court, and that the subpoena *duces tecum* in question was void for the following reasons—and I do not mention these objections in the order of their importance, but in the order in which they should be logically presented to the court:

First: There was no order of, or application to, any court or judge for the issuance of the subpoena *duces tecum*.

Second: The subpoena does not state that there was any proceeding of any character pending before the grand jury for which the attendance of the witness, or the production of the books, papers and documents called for was required. No reference is made in the subpoena to any proceeding whatsoever before the grand jury.

Third: No charge of any kind whatsoever had been presented by special counsel for the government, or by the district attorney, to the grand jury, nor was any charge then pending against anyone, or any investigation in any way, directly or indirectly, requiring the books, papers and records, or any of them, specified in the subpoena *duces tecum*, or in which any of these books or records could furnish any evidence,

nor had the grand jury before it, of its own initiation, any proceeding of any kind whatsoever involving any matter or thing referred to in the subpoena. In other words, the grand jury was being used as an adjunct of the office of the district attorney for the purpose of obtaining evidence for use in the pending trial to which I have just referred.

Fourth: Even if the subpoena *duces tecum* were legally issued, nevertheless the demand contained in it was so broad and sweeping as to constitute an unreasonable search and seizure within the meaning of the fourth amendment of the Constitution of the United States; and

Fifth: Nowhere in the record does it appear that the documents and books called for by the subpoena *duces tecum*, assuming it to have been legally issued, were, nor was any of them, material or relevant to any charge or investigation before the grand jury, even if one was then pending, and, therefore, there was no showing sufficient to entitle the learned court below to adjudge the appellant in contempt.

These objections are inter-related and serve to explain each other, as the court will notice in examining several of the decisions to which I propose to call attention.

THE ISSUANCE OF THE SUBPOENA DUCES TECUM WAS NOT PROPERLY AUTHORIZED.

The first reason assigned by us for maintaining that the subpoena was void is that it was not properly authorized or issued.

Hence appellant and plaintiff in error Norcross was deprived of his liberty and plaintiff in error Western Fuel Company was deprived of its property without due process of law, contrary to the fifth amendment to the Constitution.

The general power to issue a subpoena *duces tecum* is found in section 716 of the Revised Statutes, which was originally enacted in the act of Sept. 24, 1789, Ch. 20, 1 Stat. L., 81, and in the act of March 2, 1793, Ch. 22, 1 Stat. L., 334, which invests the Supreme Court and the Circuit and District Courts with power to issue writs of *scire facias*, and also

“all writs not specifically provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the usages and principles of law.”

The court will recall that the fourth amendment to the Constitution to which we shall have occasion to refer again, and somewhat more at length, provides:

“The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.”

The Supreme Court of the United States has likened a subpoena *duces tecum* to a search warrant. It was so held in

Boyd v. U. S., hereafter referred to; and
Hale v. Henkel, also cited later.

It is also similar, in effect, to a notice to produce under sec. 724 of the Revised Statutes.

Cons. Rendering Co. v. Vermont, 207 U. S., 541,
52 L. Ed. 327, 334,

and, in a way, to a bill of discovery in equity. Their object is the same and they accomplish virtually the same result. A subpoena *duces tecum* compels a person upon whom demand is made to produce before a grand jury, or examining magistrate, or in court, papers or documents in his possession or under his control, thereby constituting it a search with respect to such papers and documents and when sequestered or impounded likewise becomes a seizure. It makes no difference in point of principle whether these papers and documents be produced by the person who has control of them pursuant to compulsory process, such as by a subpoena *duces tecum*, or notice to produce, or as the result of a decree on a bill of discovery, or whether the place where they are kept be searched by an officer of the government and the papers obtained in that way; the result is the same. The papers are produced and used by the government or party at whose instance they are obtained, for such purposes and in such ways as the law permits. The point is that no matter what may be the form of process, it can only be authorized by the court upon an application or showing which shall disclose, among other things, the pendency of a legal proceeding or of an investigation by or before a magistrate or body authorized to conduct it, and that the books and papers desired are relevant and material to that proceeding or investigation.

And so the proper practice is for a clerk of court to issue a subpoena *duces tecum* only upon the authority of a court or judge thereof. Sec. 869 of the Revised Statutes requires it under a *dedimus potestatem* before a commissioner. Why should not a similar order be required where the documents are to be produced before a grand jury?

In the Wilson case, to which attention will be hereafter called, it was stated as one of the many reasons why Wilson's imprisonment was illegal that the subpoena *duces tecum* was not issued pursuant to an order of court, but the record is silent on the subject; nor was the point discussed or referred to by counsel on either side or adverted to in the opinion. Apparently the record in that case did not give opportunity to insist upon the objection.

In the case of

Dancel et al v. Goodyear Shoe Machinery Co.,
128 Fed., 753,

Judge Colt, circuit judge for the district of Massachusetts, had occasion to consider the practice as to the issuance of a subpoena *duces tecum* in connection with the taking of depositions *de bene esse*. In that case a petition had been made to the court for an order directing the clerk to issue a subpoena *duces tecum*, and opposition to the granting of the petition was made on several grounds. The decision is a somewhat lengthy one in which Judge Colt has reviewed a number of

authorities bearing upon various phases of the subject, saying in part (p. 756):

“It is further contended that it is the universal practice outside of the district of Massachusetts for the clerk of the court to issue a subpoena *duces tecum* as of course. There is no authority cited which supports this proposition. This will appear from an analysis of the cases upon which the petitioners rely.”

Then follows the citation of a number of cases which the court reviews.

In speaking of the case of

U. S. v. Tilden, 10 Ben. 566, Fed. Cas. No. 16,522, Judge Colt says (p. 757):

“It will be noticed that the court did not hold that it had the power by a subpoena *duces tecum* to call for the production of any papers, but only those which would be competent evidence in the case. It followed necessarily, from this limitation of the court’s power, that a subpoena *duces tecum* should not issue as of course, but only under some restrictions, such as a prior investigation into the materiality of the evidence called for; and the court so held.”

Judge Colt then further quotes the language of the court in that case as follows, which is also applicable to our objection that the demand contained in the subpoena is unreasonable:

““But it certainly is a startling, and, I believe, a novel, proposition that a merchant, or broker, or banker may be subpoenaed to produce all his books of account and all his business papers during a period of 10 years, as was substantially attempted in this case, upon a mere possibility that out of

this mass of books and papers some might be found whereby he could refresh his memory if it should, upon his examination, appear that his memory needed refreshing on some point on which he should prove to be able to give testimony competent in the cause. No precedent is produced for this exercise of power, nor has any statute or decision been found or cited which appears to recognize or authorize the compulsory production of books and papers for such a purpose; the same not being relevant or material to the cause. * * *

It has been well pointed out that in such examinations, on account of the limited power of the examining magistrate, persons summoned for such examination have less chance of protection against the oppressive and injurious use of this power of the court than upon a trial in court, where all questions arising can be submitted to and decided by the court as they arise; and I am satisfied that the statute in question does not require a construction permitting such a compulsory production of a witness' books and papers. A very strong, if not a controlling argument in support of this view is to be drawn from the terms of the statute of 1827 (Rev. St. secs. 868, 869 [U. S. Comp. St. 1901, pp. 664, 665]), above referred to. In providing for the regulation of this very matter in examinations under a commission or *dedimus potestatem*, it expressly limits the compulsory production of books and papers to such only as would be, "if produced, competent and material evidence for the party applying therefor." This is a legislative declaration of the highest possible character, as it seems to me, that this was as far as the policy of the law goes in the matter of compelling the production of books and papers on the examination of witnesses out of court, and all that substantial justice requires in this direction, having a due regard to the rights, the convenience and the interests of other persons, as well as of the parties litigant. No reason can well be imagined for sup-

posing that Congress would withhold from this class of examinations under commission, where the commissioners are appointed by the court, and the mode of interrogation is prescribed before the examination under the direction of the court itself, as full an authority to compel the production of books and papers by the witness as is allowed on an examination *de bene esse*, which is subject to less restriction and supervision. This act, therefore, seems to show that Congress understood that this was the limit allowed for the compulsory production of books and papers under the system of examinations *de bene esse* then in force.' ”

Judge Colt then said:

“This sound reasoning fully covers the point under consideration, and is directly opposed to the petitioners’ position.”

If it may be said that persons summoned for such examination before an examining magistrate have a less chance of protection against the improper use of the power of the court to compel the production of evidence than upon a trial in court where they are represented and where the relevancy or materiality of evidence can be then passed upon, it may be said with equal truth, or greater force, that a person summoned to give such evidence before a grand jury is equally or more completely unprotected, particularly so as the proceeding is there *ex parte*, wholly conducted by the government, before no magistrate competent to rule upon the admissibility of evidence, and with no counsel present to represent the witness.

Judge Colt further refers to the case of

Edison Electric Light Co. v. United States Electric Light Co., 44 Fed. 294; 45 Fed. 55,

where the officers of one of the parties were adjudged in contempt for failing to obey a subpoena *duces tecum* apparently properly obtained by defendant, and said (and I may here say that much in Judge Colt's opinion and in the cases he cites sustains our fourth contention that the subpoena in question is too sweeping in its demand to be reasonable) (p. 759):

“The defendant is not ‘claiming the right to a general inquisitorial examination of all the books papers, and documents of his adversary, with the view to ascertain if, perchance, something may be found which will possibly aid it’; nor is it asking ‘before the hearing to pry into the case of its adversary,’ nor ‘to see in advance of the trial evidence which the other side are going to produce,’ nor ‘calling upon its adversary to exhibit for inspection anything and everything in writing under the latter’s control, which may assist the defendant’; nor is this an ‘unnecessary inquisition into the contents of private papers by one who has no interest in them.’ No ‘complete disclosure of everything the complainant knows or believes in relation to the matter in question’ is sought for, nor is this a ‘general fishing excursion’. A particular document, whose existence is well known to both parties, and in fact to the general public, is specifically called for. It is described with a fullness (by date, description, and serial number) which leaves no doubt as to its identity. * * *”

Said Judge Colt further in the course of his opinion (pp. 760-761):

“From this review of the cases relied upon by the petitioners, I find nothing to support or war-

rant the practice that a party may apply to the clerk for a subpoena *duces tecum* under section 863 to take testimony *de bene esse* before a notary public, and may, in his discretion, either fill in himself, or ask the clerk to fill in, a direction to the witness to produce before the magistrate whatever books and papers he sees fit to call for, and that the witness is bound to produce them at the time and place named, or render himself liable to punishment for contempt. Such a practice, in my opinion, would be a violation of the spirit, if not of the letter, of the constitutional provision which secures to the individual protection against unwarrantable searches and seizures of his private papers, and of the legislative expressions of Congress as embodied in the statutes relating to this subject, as well as of the general rule, which the courts have ever adhered to, of guarding witnesses against the unnecessary production and inspection of their private papers. It is to be borne in mind, in this connection, that the compulsory production of books and papers in court, where all questions as they arise can be submitted to and decided by the court, is very different from their compulsory production before a notary public under section 863, or an examiner under equity rule 67, where the magistrate has little power to afford protection to the witness. In the latter instance the practice cannot but lead to abuse, oppression and injustice. The case at bar affords a good illustration of the evils which would result. We have here a subpoena *duces tecum*, signed by a notary public, directing the two witnesses named to produce before him substantially all the books of every nature of three corporations.

“A party undoubtedly has the right to invoke the process of the court to compel the attendance of witnesses and the production of such papers as are material to his case; but neither the right of a party nor the power of the court extends beyond this. A party has no right, and the court has no

power, to compel the production, either in court or before a magistrate, of the private papers of a witness which are not relevant and material to the case. Any practice which sanctions such a proceeding is unwarranted, and an infringement upon a fundamental personal right guaranteed by the federal Constitution. The courts have always recognized this protection to the individual, secured by our organic law. Such recognition is seen in the distinction which is made between a subpoena *ad testificandum* and a subpoena *duces tecum*. *The former is a process of right, while the latter is addressed to the discretion of the court.* [Italics ours.] Discretion here does not mean that the court has power to refuse the compulsory production of a paper which is material evidence in the case, but that, *before compelling its production by a subpoena duces tecum, it will sufficiently inquire into the matter to determine if the evidence appears to be material, and, if not satisfied on this point, will decline to issue the writ.*

“An important discussion of this subject is found in the report of the trial of Aaron Burr. The counsel for the defendant in that case moved the court for a subpoena *duces tecum*, directed to the President of the United States, calling for the production of certain papers. Mr. Wirt, in opposing the motion, said:

“ ‘The subpoena *ad testificandum* is a matter of right, and the prisoner might have demanded it from the clerk without the intervention of the court; but here is a motion for a subpoena *duces tecum*, to compel the President to produce certain papers of state, the materiality of which is not shown. I shall contend, first, sir, that the subpoena *duces tecum* is not a process of right, that the motion for it is a motion addressed to the discretion of the court, and that the court may award or withhold it as they see fit. In the next place, I shall contend that this discretion of the court

should be controlled and determined only by the relevancy and materiality of the papers required.'

"Mr. Wickham, counsel for the defendant, interrupting Mr. Wirt, said:

" 'We admit that it is an application to the sound discretion of the court.'

"Chief Justice Marshall, in deciding the motion, said:

" 'This is said to be a motion to the discretion of the court. This is true.'

"In proceeding to discuss the nature of this discretion, the Chief Justice said:

" 'But the court has no right to refuse its aid to motions for papers to which the accused may be entitled, and which may be material to his defense. * * * If it be apparent that the papers are irrelative to the case, or that, for state reasons, they cannot be introduced into the defense, the subpoena *duces tecum* would be useless. But if this be not apparent, if they may be important in the defense, if they may be safely read at the trial, would it not be a blot in the page which records the judicial proceedings of this country, if, in a case of such serious import as this, the accused should be denied the use of them?'

"See Robertson's Report of Burr's Trial, vol. 1, pp. 136, 137, 182, 183, 184; Dillon's John Marshall, p. xxxviii, and note. For an instructive review of this general question, see Judge Cooley's Inviolability of Telegraphic Correspondence, 27 Am. Law Reg. 65, and Hitchcock's Inviolability of Telegrams, 2 Am. Bar Ass'n Rep. p. 93.

"In all cases where Congress has legislated on this subject, it has recognized the distinction between a subpoena *ad testificandum* and a subpoena *duces tecum*, and has carefully restricted the issuance of the latter process."

Again (p. 762):

“For these reasons, I am of opinion that the settled practice of this circuit is correct, and that a subpoena *duces tecum* should not issue, either under section 863, or equity rule 67, except by order of court, upon preliminary proof that the documents called for are in the possession of the witness and are prima facie competent and material evidence in the case. The court will not finally determine the question of materiality on such application, but it must be reasonably satisfied that the evidence is relevant and material.
* * * To compel these witnesses, upon the proof submitted to bring before the examiner this mass of private books and papers, would be an oppressive, if not an unconstitutional, use of the power of the court, and an abuse of its process.”

The same observations may be properly made respecting the attempt to compel the appellant and Western Fuel Company to bring before the grand jury the mass of books and papers called for by the subpoena here under consideration.

In the case of

United States v. Terminal R. Ass'n, et al., 154
Fed. 268,

which came before the court on a motion in an equity case to quash a subpoena *duces tecum*, the court held that the order for the issuance of the subpoena was improvidently granted, and sustained the motion to quash, saying:

“That a subpoena *duces tecum* should not issue as of course, but only under some restrictions, such as a prior investigation into the materiality of the evidence called for.”

The court there refers to the case of

United States v. Hunter, 15 Fed. 712,

which involved a similar motion, and said that the judge there

“After stating what allegations are necessary in the application for the subpoena, gives the reason therefor as follows: ‘In order that the court or judge ordering the subpoena may have some means of judging the relevancy of the testimony sought’.”

The court said further (p. 272):

“That Congress, in legislating upon this subject, has carefully restricted the power of the courts to cases in which the evidence is relevant and material. * * * Seeking the production of papers and documents for the purpose of finding out whether or not they contain information valuable to the party demanding them has been aptly denominated a ‘fishing examination’, and is always regarded as oppressive, and as such denied” (citing authorities).

In the case of

American Car and Foundry Company v. Alexandria Water Company, (Pa.) 70 Atlantic 867, 128 Am. St. Rep. 749,

the court said with reference to a subpoena *duces tecum* that was there under consideration—and what was there said is again equally applicable to our contention respecting the reasonableness of the government’s demand:

“Anything in the nature of a mere fishing expedition is not to be encouraged. Where the plaintiff will swear that some specific book contains

material or important evidence, and sufficiently describes and identifies what he wants, it is proper that he should have it produced. But this does not entitle him to have brought in a mass of books and papers in order that he may search them through to gather evidence. In 23 American and English Encyclopedia of Law, second edition, 179, it is said: 'The courts uniformly decline to grant an application for production and inspection where it is merely for the purpose of a fishing examination, as where it is made to discover whether or not there is evidence contained in the documents which will be useful to the applicant, or for the purpose of determining whether he has a cause of action, or a defense, or in anticipation of a defense, or to gratify curiosity.'

"And the fair and proper rule upon the subject is also set forth in 3 Wigmore on Evidence (1904), section 2200, where it is said: 'A peculiarity of the subpoena *duces tecum* is that in the nature of things it must specify with as much precision as is fair and feasible the particular documents desired, because the witness ought not to be required to bring what is not needed, and he cannot know what is needed unless he is informed beforehand.' And in a note to above the following cases are cited: *Carson v. Hawley*, 82 Minn. 204, 84 N. W. 746 (demand for all books and papers for a business during three months held insufficient); *Ex parte Brown*, 72 Mo. 83, 37 Am. Rep. 426 (there must be a reasonably accurate description of the papers wanted,' and a showing that it is material in a pending cause; here, a call for all telegrams between half a dozen persons within fifteen months past was held too broad); *United States v. Babcock*, 3 Dill. 566, Fed. Cas. 14,484 ('the papers are required to be stated or specified only with that degree of certainty which is practicable, considering all the circumstances of the case, so that the witness may be able to know what is wanted of him and to have the papers on the trial, so that

they can be used if the court shall then determine that they are competent and relative evidence’).

“An order to produce all papers concerning the matter in dispute is not sufficiently specific. The papers and documents to be produced should be described with reasonable precision. An inspection of the subpoena in this case shows that the court below was fully justified in refusing to compel obedience to what was asked for. The first assignment of error is, therefore, dismissed. For the same reason the second assignment of error is overruled. It was unreasonable to ask for a blanket list of persons and firms with whom contracts had been made during the year. In the absence of all particularity in specifying what was wanted, and without any showing of materiality, the court was right in sustaining the objection to the demand for a general list of contracts with other persons.”

The court will find quite an instructive note appended to that case which asserts that in the federal courts a subpoena *duces tecum* is not a matter of right and may not be issued as such by the clerk, but only by an order of the court; and as authorities the following cases are cited:

Bentley v. People, 104 Ill. App. 353; 107 Ill. App. 245;

Duke v. Brown, 18 Ind. 111; and

Dancel v. Goodyear Shoe Machinery Co., just referred to.

It was said by Mr. Justice Hughes in the very recent case of

American Lithographic Co. v. Werckmeister, 221 U. S. 603 (55 L. Ed. p. 873),

that under the fourteenth section of the judiciary act of 1789, which is now found in sec. 716 of the Revised Statutes:

“Power was conferred upon the federal courts to issue all writs not specially provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the practice and usages of law. This comprehended the authority to issue subpoenas *duces tecum*, for ‘the right to resort to means competent to compel the production of written, as well as oral, testimony, seems essential to the very existence and constitution of a court of common law.’ *Amey v. Long*, 9 East. p. 484. Section 724, which was originally § 15 of the judiciary act of 1789, was to meet the difficulty arising out of the rules relating to parties at common law, and to provide, by motion, a substitute *quoad hoc* for a bill of discovery in aid of a legal action” (citing further authorities).

The court said further:

“It was not the purpose of § 724 to interpose an obstacle to the exercise of the general power of the court with respect to the issuance of subpoenas *duces tecum*, and that was not its effect. The barrier, in the case of parties, existed independently of the provisions of the section, and by these it was sought to mitigate the resulting inconvenience. When, however, the rule as to parties was changed, it followed that the obstacle was removed, and by virtue of the general authority of the court, subpoenas *duces tecum* may run to parties as well as to others,—leaving those who are subpoenaed to attack the process if of improper scope or lacking in definiteness, or to assert against its compulsion whatever privileges they may enjoy” (citing further authorities).

By reason of the limited amount of time at my disposal I pass by this point without further discussion

because it is the least important point in the case and only concerns the question of procedure; for if the counsel for the government could make a proper showing to the court below that they were entitled to the subpoena *duces tecum*, that court would undoubtedly make the necessary order. There are, however, other and graver reasons militating against the validity of the subpoena in this case, and the right of the court below to order the production of the books and records there called for, each one of which seems absolutely conclusive of the correctness of appellant's refusal to recognize the process served upon him.

**THERE WAS NO PROCEEDING PENDING BEFORE THE
GRAND JURY.**

The second and third objections which I have heretofore stated to the validity of the subpoena *duces tecum* may, for the sake of brevity, be considered together. These objections are that not only does the subpoena itself fail to state that any proceeding was pending before the grand jury, but as a matter of fact there was no proceeding of any kind so pending. There was no charge against anyone under investigation by the grand jury, although one of the learned counsel for the government, at the eleventh hour on the hearing upon the citation to show cause why appellant should not be punished for contempt, endeavored to grasp at a straw and save the situation by asserting that it was the intention of the government to ascertain to what extent other unnamed parties had been

involved; but who these parties are, or what was the charge contemplated against them, was not disclosed, and it is apparent from an examination of the record and of the grand jury's presentment that this was an afterthought. The contention of the government was that it made no difference what its object was in endeavoring to obtain possession of these books and papers; that counsel was entitled to them anyway; and we submit that this court cannot, in examining the evidentiary showing made during the hearing upon the citation, reach any other conclusion than that it was an attempt by counsel for the government to embark upon a fishing expedition and use the grand jury merely, as I have said, as an adjunct of the district attorney's office in order to assist the government in the preparation of its case upon the trial under one of the indictments.

On the hearing upon the citation the following took place with respect to the pendency of a charge or investigation before the grand jury (record, pp. 80-82).

In a portion of his affidavit appellant said:

"Outside the grand jury room that afternoon I saw Mr. Tidwell, the government's special agent, and I said, 'Is this for the purpose of bringing further indictments?' He replied: 'No, this is not for the purpose of further indictments, we didn't get the records prior to 1906.' I then said, 'No, you didn't get those records because they were burned in the fire, and I told you so at the time you were making your examination.'

"The next day, August 7, 1913, Mr. Tidwell telephoned me and asked me to come down to

his office, as there were some matters he wanted to talk over with me. After I got there he stated that the place the books were wanted was in his office, as 'it would be handiest to work on them there.'

"On the next day, August 8, 1913, the following news item appeared in the San Francisco Examiner:

" 'JURY RESUMES FUEL CO. TRIAL.

"David C. Norcross, Secretary of Organization,
"Examined by Prosecutor Roche.

"The federal grand jury at its first meeting yesterday afternoon resumed the investigation of the alleged Western Fuel Company frauds. The government was represented by Theodore Roche, Esq., special prosecutor, and he spent a whole hour examining David C. Norcross, secretary of the Western Fuel Company.

"It is understood that Special Prosecutor Roche has instituted further investigations of the Western Fuel Company to gather evidence to be used in the coming trial of the eight officials who were indicted on the charge of conspiracy.'

"The contents of this item, as I am informed and believe and therefore state, were given out by, or with the consent of the special assistants to the attorney general mentioned therein. I am further informed and believe and therefore state that this article correctly states their intention in having me subpoenaed before the grand jury.

"On August 14, 1913, the subpoena specifically mentioned in the citation was served upon me. A copy of this subpoena is attached hereto and marked Exhibit 'A'. It will be observed from reading it that it does not state that there is any case or matter being investigated by the grand jury. It simply requires me to appear before the grand jury at 2 o'clock that afternoon and bring with me all the books and papers of the company of every description.

"After consulting counsel I appeared before the grand jury at the appointed time, and gave the following answer:

" 'Counsel have instructed me that I am not required under this subpoena, either to testify before the grand jury or to produce the books and papers of the Western Fuel Company. Accordingly, without any disrespect to the grand jury I must decline to testify further or to produce the books until the court has passed upon the matter.' * * *

"I do not believe there ever has been an intention of exhibiting these books or examining them in the presence of the grand jury or during its sessions, but I believe the fact to be, as I was informed by Mr. Tidwell, and I therefore state that what was really wanted of me was to turn the books over to Mr. Tidwell so that he might work upon them at his office." (Record, pp. 82-3.)

"Mr. KNIGHT. Will it also be admitted, Mr. Sullivan, without the necessity of calling witnesses, that some ten days ago you stated to Mr. Warren Olney, Jr., in his office, that there were no further proceedings contemplated against the parties under indictment and connected with the Western Fuel Company?

"Mr. SULLIVAN. I will state that I had a conversation with Mr. Olney about ten days ago; in response to a statement made by him that he was inclined to advise the production of books that at that time while having a conversation with him the government had no present intention of filing any further indictments against the Western Fuel Company or the defendants. That is correct, Mr. Olney, is it not?

"Mr. OLNEY. Yes, Mr. Sullivan, that was your statement to me.

"Mr. SULLIVAN. Yes, that we had then no present intention. You now claim for the first time that the time for compliance with the subpoena was too short, do you? * * * (Record, pp. 88-89.)

“Mr. KNIGHT. We want to call Mr. Hanify with reference to questions as to whether there was anything pending before the grand jury at the time that subpoena was served on Mr. Norcross, and at the time that Mr. Norcross attended.

“Mr. SULLIVAN. We consider that showing immaterial, if your Honor please. How can the grand jury know what the government intends to present?

“Mr. KNIGHT. What we want to show is that at the time that Mr. Norcross was served with a subpoena—I would suggest this, Mr. Sullivan, that you admit, subject to its materiality, that there was not at the time of the service of the subpoena on August 14th and at the time Mr. Norcross appeared before the grand jury, or theretofore, and after the last indictment had been returned against the present defendants, any proceeding pending before the grand jury or any charge before the grand jury against these defendants, or any of them.

“Mr. SULLIVAN. I will admit that there was no formal charge pending before the grand jury at the time the subpoena was served upon Mr. Norcross; but to a certain extent there was a proceeding pending before the grand jury because Mr. Norcross had attended before the grand jury on two occasions before that, and he was sworn and questioned and testified to a certain extent.

“Mr. KNIGHT. Mr. Sullivan was that proceeding anything further than merely a proceeding to obtain an examination of the books, papers and documents of the Western Fuel Company that are specified in the subpoena?

“Mr. SULLIVAN. In the first place, we consider that fact immaterial, and in the next place the government is not called upon to disclose the intention which it had when it called upon Mr. Norcross to produce the books of the Western Fuel Company.

“Mr. KNIGHT. Of course, Mr. Sullivan, we don’t ask you to waive any objection you may have as to the materiality or relevancy of that evidence. We merely want to get the fact before the court as to the fact that there was no proceeding against these defendants or any of them pending, nor had any charge been made against these defendants or any of them to the grand jury at the time of the service of these subpoenas and at the time the witness was called upon to testify in obedience to them.

“Mr. SULLIVAN. I will admit that at the time the subpoena was served there were no formal proceedings pending against the Western Fuel Company or against any of the defendants named in the indictment. That is as far as the government will go. But I will state in good faith to counsel that there are other parties involved in these frauds who have not yet been indicted. And I will state that it is the intention of the government to ascertain to what extent these other parties have been involved and if their action is criminal, then the government will take such course as it deems proper in the premises.’ But I frankly admit that when the subpoena was served the government had and at that particular time no formal charges were pending against the Western Fuel Company or against its directors, other than those charges which are now pending and appear in the indictments heretofore filed in this court.

“Mr. KNIGHT. Of course, you refer to a formal charge. I don’t know whether any distinction could be made as between a formal or an informal charge. *My point is, and I ask you to admit it if it is the fact, that at this time there was no charge that had been presented by the district attorney or by special counsel for the government against the defendants under the present indictments, or any of them, and that no charge had been originated so far as you know in the grand jury without the consent of the district attorney.*

"Mr. SULLIVAN. *We will make that admission in so far as the Western Fuel Company and the present defendants are concerned. We will not make any admission as to any others, Mr. Knight.*
* * * (Record, pp. 90-93.)

"Mr. STANLEY MOORE. If your Honor please, Mr. Hanify, the foreman of the grand jury, is in attendance now and we do not like to ask that he remain here. I think that perhaps it would save time to remove some of these questions about which argument might be made if we should just put him on the stand and let him go his way.

"Mr. SULLIVAN. What do you want to prove by him?

"Mr. STANLEY MOORE. I will call him to the stand and ask him the questions. I want to prove by him, that, as a matter of fact, there was no investigation of any kind pending before the grand jury; that this gentleman was just subpoenaed there to produce these books and papers, and there was no idea of an indictment. The idea was that you should get possession of them, or rather, Mr. Tidwell, in order that he could work on them, just as he told Mr. Norcross down in the office that day. If there is going to be any dispute about that, or any dilly-dallying or splitting of hairs as to whether there were supposedly some mysterious person who might be indicted, some person on the stock books or on the ledgers, we want to get that matter behind us.

"Mr. ROCHE. Well you don't mean to say that Mr. Hanify is in a position to say that any indictments were pending against any people other than as against any officials of the company, do you? He certainly has not given you that information.

"Mr. STANLEY MOORE. Well, Mr. Roche, we know what you have said; we know what you have said in that interview of yours in the 'Examiner'. And we know what Mr. Sullivan said down in Mr. Olney's office, that no further indictments were contemplated. We also know that Mr. Tidwell said, that

this was not a matter of further indictment. Now, to remove any possibility of doubt about it, and in order that this court may act without any doubt upon the matter at all, and in so far as this can be determined as a question of law, we would like to call the remaining factor and prove by the spokesman of the grand jury that there was no further idea of indictments in so far as this proceeding was concerned. As long as there is a disposition here, for the purposes of this argument, to say that the grand jury might have been looking into these books for the purpose of indicting additional persons, we want to set that at rest.

“Mr. SULLIVAN. You want to prove by him that so far as he is personally concerned he did not know of any such procedure?

“Mr. STANLEY MOORE. Precisely.

“Mr. SULLIVAN. He cannot speak for the government or for the other grand jurors, can he?

“Mr. STANLEY MOORE. No. I think in a measure he could speak for the other grand jurors, he being the foreman and the head of the grand jury. But if you will admit that Mr. Hanify, if produced upon the stand, would testify, subject to your objections, that this matter was brought before the grand jury in the way of this subpoena and these papers brought up here, at their first session without any idea so far as he was concerned, or other members of the grand jury, so far as his knowledge and information is concerned, of preferring any other indictments but simply to enable you gentlemen, or the special agents, to check over these books, then there will be no occasion for calling him.

“Mr. SULLIVAN. We won't make the last admission.

“Mr. STANLEY MOORE. Mr. Hanify, will you step forward, please.

“JOHN R. HANIFY,
called and sworn:

"Mr. STANLEY MOORE. Q. Your name is John R. Hanify? A. Yes, sir.

"The COURT. What do you wish to show by this witness other than what counsel has expressed a willingness to admit?

"Mr. STANLEY MOORE. Your Honor, it is a very slight difference. I do not see why there should be any difficulty among counsel in agreeing upon the facts of this case. *I propose to show, if your Honor please, that there was no investigation of any kind in so far as the foreman of the grand jury was aware of at the time that this subpoena was issued and the production of these books was called for.*

"The COURT. *Counsel has expressed a willingness to admit that.*

"Mr. SULLIVAN. *We admit that.*

"Mr. STANLEY MOORE. *And there was no idea, so far as the foreman of the grand jury is aware, of preferring further indictments against anyone at this time.*

"Mr. SULLIVAN. *So far as he knows?*

"Mr. STANLEY MOORE. *Yes.*

"Mr. SULLIVAN. *We admit that. We did not apply to him.*

"The COURT. *Counsel has admitted everything the witness might testify to.*

"Mr. STANLEY MOORE. Will it be admitted, further than that, that if such a matter had been taken up with the grand jury, they would have been apprised of that fact through the medium of their foreman?

"Mr. SULLIVAN. *Certainly not.*

"Mr. STANLEY MOORE. Then there is some disposition, or apparently there might be an argument made here as to the sufficiency of this proof. We have called for the most appropriate member of the grand jury we could think of. The matter is immaterial to us except so far as the question of time is concerned.

"The COURT. I understand that, but it seems to me they have admitted everything that this witness can with any reason be expected to know. I do not desire to shut you off from any showing you wish to make I cannot conceive of anything this witness can testify to that has not been admitted by counsel. *Counsel has admitted that so far as this witness is concerned all that you claim is true.*

"Mr. STANLEY MOORE. Mr. Sullivan, would you make this admission, simply as going to the completeness of our evidence here a showing in this behalf, the foreman of the grand jury being here available; *will you admit that as to the remaining members of the grand jury there was no statement by you that the government desired the grand jury to take up or consider an investigation having in view the presentation of further indictments as against these defendants or any other individuals connected with the Western Fuel Company?*

"Mr. SULLIVAN. *Yes, we will admit that. That is correct.*

"Mr. KNIGHT. Q. Mr. Hanify, at all times mentioned in these subpoenas you were the foreman of the grand jury and in attendance and presided over its deliberations?

"Mr. SULLIVAN. It seems to me our admissions are very broad and complete. I do not think it is necessary to go into the secrets of the grand jury. I don't think this witness has a right to testify.

"The COURT. Yes, it has been assumed that he was the foreman of the grand jury.

"Mr. KNIGHT. And that he was in attendance?

"Mr. SULLIVAN. Yes, that he was in attendance.

"The COURT. You may now proceed with your arguments." (Record, pp. 97-107.)

Is it not apparent to the court that the sole object of demanding that the Western Fuel Company produce its books and papers before the grand jury was to enable special counsel for the government to make therefrom, if it could, a case against the defendants who were about to go to trial?

It is contended that the fact that Mr. Norcross had been previously called before the grand jury and had been examined by counsel for the government proved that a legal investigation was pending before the grand jury at that time. It is apparent from the record, however, that this previous examination of Mr. Norcross was in line with the later attempt, as expressed in the subpoena *duces tecum* of the 14th of August, to extract information which would be of service to the government in the trial of the case, and not for the purpose of finding or considering indictments against anyone. The government was about to go to trial upon one of the indictments that had already been found, and it then for the first time became suspiciously active before the grand jury.

In its presentment (record, p. 26) the foreman and the special assistants to the attorney general state that Mr. Norcross was sworn "to testify as a witness in an investigation then being pursued by said grand jury concerning certain frauds alleged to have been perpetrated and committed by said Western Fuel Company against the United States". All parties to the presentment denied that there was any charge pending or contemplated against the Western Fuel

Company or anyone connected with it; and whatever proceeding was being cogitated in the back of the head of one of the special assistants to the attorney general is hardly tangible enough for this court to take notice of, especially where constitutional rights are in jeopardy.

If the court will compare these statements and admissions with the statement contained in the presentment to the grand jury (record, p. 26) where the foreman is made to say that the investigation concerned certain frauds alleged to have been perpetrated by the Western Fuel Company and will compare them also with the judgment of the court wherein it is said that appellant was sworn to testify "as a witness in an investigation then being pursued by said grand jury concerning certain frauds alleged to have been perpetrated against the United States" (record, p. 20) it will become apparent that the only investigation referred to was the fishing expedition so universally condemned by judicial authorities which have had occasion to consider the subject. Otherwise, despite the statement in the judgment and the statement in the presentment there was no investigation of any kind then pending; and the evidence wholly fails to support the finding in the judgment in that respect, if the statement be deemed to be a finding of fact.

We admit that the presentment of an indictment against a defendant does not preclude the grand jury which found it, or a subsequent grand jury, from finding new indictments against the same party; but their in-

vestigation of the matter subsequent to the finding of an indictment must be with reference to the finding, or at least consideration, of a new indictment, and not merely to assist the government in the preparation for trial under an indictment already found.

The necessity for the existence of some kind of an investigation or proceeding before the grand jury in order to entitle the latter body to call for the production of documentary evidence before it has been the subject of judicial consideration.

In the cases of

In re Shaw, and

In re McLaughlin, 172 Fed. 520,

the Circuit Court for the Southern District of New York said:

“The form [of subpoena] used in this district indicates at least a general intention that a witness shall be informed of the matter about which he will be called upon to testify. I think it is proper that he should be. The fifth amendment to the Constitution provides that no one ‘shall be compelled in any criminal case to be a witness against himself.’ The Supreme Court has construed this provision largely holding that it is not confined to a criminal case against the witness himself, but extends to any criminal investigation. *Counselman v. Hitchcock*, 142 U. S. 547, 12 Sup. Ct. 195, 35 L. Ed. 1110.

“It is quite clear that the ordinary citizen called upon to testify in the strange environment of the grand jury room under the interrogation of the United States attorney will be quite unable to assert his rights, even if he knows what they are. He ought to have an opportunity to consult counsel and be advised of the extent of his right to refuse

to testify, and of the way in which to protect himself against giving testimony that might incriminate him.

“The United States attorney contends that in this country the grand jury has an inquisitorial power to investigate of its own motion, and that in some instances the utmost secrecy may be necessary to the success of its inquiry, and that the protection of witnesses may safely rest on the presumption that neither the grand jury nor the United States attorney will do anything unfair or oppressive.

“It would also contribute greatly to the success and celerity of some investigations if the authorities had an unlimited right to search and seize persons, houses, and papers; but the right of the citizen against such proceedings is not left to depend upon any such presumption. He is guaranteed against unreasonable searches and seizures by the fourth amendment to the Constitution. So it would unquestionably speed the detection and conviction of crime to compel suspected persons to testify; but no principle of our law is better settled than that this cannot be done.

“The subpoena being the court’s writ, it is the duty of the court, consistently with existing statutes, to regulate the use of it. It is not a question of the nature of the particular subject now under consideration by the grand jury nor of the fairness of the present United States attorney and his assistants and of the present grand jury; but the question is to determine the practice to be followed in this district in all cases by all United States attorneys and grand juries, a matter concededly of the utmost moment.

“It is pointed out that the grand jury may often be unable to name any person as connected with the subject that it is investigating of its own inquisitorial power, and, if it cannot subpoena witnesses without naming some person, the inquiry must be altogether abandoned. I think the answer

to this is that it can in such a case state in the subpoena the subject of its inquiry and so fix some definition of and limit to the examination to which the witness may be subjected. This was done in the subpoena issued out of this court in the case of the United States v. Kimball, 117 Fed. 156. It must be admitted that there is a strange absence of authority upon the subject; but Justice Brown, in *Hale v. Henkel*, 201 U. S. 43, 65, 26 Sup. Ct. 370, 375, 50 L. Ed. 652, said:

“ ‘We deem it entirely clear that under the practice in this country, at least, the examination of witnesses need not be preceded by a presentment or indictment formally drawn up, but that the grand jury may proceed, either upon their own knowledge or upon the examination of witnesses, to inquire for themselves whether a crime cognizable by the court has been committed, that the result of their investigations may be subsequently embodied in an indictment, and that in summoning witnesses it is quite sufficient to apprise them of the names of the parties with respect to whom they will be called upon to testify, without indicating the nature of the charge against them.’

“This language indicates that the Supreme Court thinks that witnesses should be informed in the subpoena of the names of the parties with respect to whom they will be called to testify [italics ours], although it holds it not necessary to disclose the charge brought against those persons. It must be remembered that Justice Brown was discussing the demand of a witness who has been subpoenaed to testify in a case against named persons, to know the specific charge made. It is quite in line with his view that, if the witness cannot be apprised of the name of the person so charged, he should be informed of the subject about which he will be called upon to testify.

“It is alleged that these general or John Doe subpoenas have been issued in this district for

many years. If so, they seem never to have been challenged. As Justice Bradley pointed out in *Boyd v. United States*, 116 U. S. 616, 6 Sup. Ct. 524, 29 L. Ed. 746, a long practice of issuing general warrants to apprehend persons suspected of the authorship of seditious libels and bring them and their papers before the Secretary of State for examination was relied on in *Entick v. Carrington*, 17 Howell's St. Tr. 1029. Lord Camden said:

“ ‘As no objection was taken to them upon the returns (to writs of habeas corpus) and the matter passed *sub silentio*, the precedents were of no weight.’ ”

“A subpoena *duces tecum* was also served upon Shaw as secretary and treasurer of the Press Publishing Company, World Building. It was held in *Hale v. Henkel*, 201 U. S. 43, 26 Sup. Ct. 370, 50 L. Ed. 652, that a subpoena *duces tecum* might amount to an unreasonable search or seizure within the fourth amendment to the Constitution. The United States attorney consents that its terms in this case may be narrowed to an extent which seems to make it reasonable. Still the fact remains that the witness has been subpoenaed to testify generally, and that he is entitled to know either what person or persons are charged by the United States, or the subject of the investigation. I do not think that the incidental reference to articles relating to the Panama Canal in the paragraph of the subpoena called for receipts is sufficient.

“The motion to quash and set aside the subpoenas is therefore granted.”

In the case of

In re Morse, 87 N. Y. Supp. 721,

Judge Goff charged the grand jury that, in order to exercise its inquisitorial power:

“It must be made to appear by complaint or information or knowledge acquired that there is

reason to believe that a crime has been committed. They have not the power to institute or prosecute an inquiry on chance or speculation that some crime may be discovered. Such an inquisition, based upon mere suspicion, would be odious and oppressive, and would not be tolerated by our laws. There must be reason to believe that a crime of a specific character has been committed by a particular person, whose name may be either known or unknown to the grand jury. * * *

They have not the power to summon a witness and examine him upon matters that are wholly unconnected with or unrelated to the subject of inquiry. The process of the grand jury can be used only for the purpose of aiding a lawful inquiry, and it must not be used for the purpose of oppression or harassment. * * * *The grand jury, being an adjunct of the court, is considered a part thereof.* * * * [italics ours]. It should be made to appear from the whole examination [of the witness] and surrounding circumstances that the question was relevant and material to the subject of the inquiry; otherwise the court, in whose immediate presence and hearing the examination did not take place, would be unable to determine whether the witness had properly or improperly claimed his privilege. * * *

“When a grand jury finds a bill of indictment, and it is presented to the court, they have no further jurisdiction of its subject-matter, so far as the person or persons therein accused of crime are concerned, except by way of a superseding indictment for the purpose of supplying some omission, or of remedying some defect in the previous indictment. They cannot institute a new and independent inquiry for the purpose of eliciting additional testimony to supplement or strengthen the testimony on which the indictment was found, or to aid the prosecutor in the trial of the case.”

With reference to a certain question put to the witness the court said:

“It is manifest that the purpose of this question was to obtain or procure from the witness information which would aid in the trial and conviction of Dodge. That is a laudable purpose, in which every good citizen should unite, for the district attorney to zealously adopt every fair and legal method to discover and present evidence sufficient to convict a man of the heinous crime against the administration of justice which Dodge is charged with having committed. But the methods used must be fair and legal. They must not be coercive or inquisitorial, and a tribunal established or a procedure designed by law for one purpose cannot be perverted to another purpose, even though the latter be meritorious. It is better that Dodge, if guilty, should go unpunished, than that the powers of the grand jury should be invoked for an unlawful purpose. If the witness Morse has knowledge of evidentiary matters connected with that charge of perjury, it rests with his own ethical or moral perceptions of what is right whether he will voluntarily disclose them to the district attorney; but he cannot be taken before the grand jury, under the guise of a witness, and compelled to furnish information which may aid the district attorney in the prosecution of an indictment already found.

“Except as I have pointed out, this grand jury had no jurisdiction of any matter connected with that indictment; and it follows that they had no power to issue process and compel the attendance of the witness Morse for the purpose indicated by this question, and whether he properly or improperly claimed his privilege becomes of no consequence.

“From the principles which I have stated, and that are applicable to your inquiry of the court, and from the conclusions which I have drawn on

reading the examination in the light of those principles, I advise you that you cannot lawfully continue the examination of the witness Morse under existing conditions, and he must be discharged from further attendance under the present subpoena.

“Should the district attorney advise the grand jury to institute an inquiry into any crime committed or triable in this county as the law directs, and Charles W. Morse is required to appear before them as a witness, there is no legal obstacle to a subpoena being issued, compelling his attendance.

“Ordered accordingly.”

In the case of

Hale v. Henkel, 201 U. S. 43; 50 L. Ed. 652,

which was an appeal from a final order of the Circuit Court, dismissing a writ of habeas corpus, involving a proceeding which originated in a subpoena *duces tecum*, it appears that the subpoena commanded Hale, who was secretary of MacAndrews & Forbes Company, to appear before the grand jury at a time and place designated to

“testify and give evidence in a certain action now pending * * * in the Circuit Court of the United States for the Southern District of New York, between the United States of America and the American Tobacco Co. and MacAndrews & Forbes Co., on the part of the United States, and that you bring with you and produce at the time and place aforesaid” certain documents.

The petitioner appeared before the grand jury and before being sworn asked to be advised of the nature of the investigation in which he had been summoned.

He was advised by the assistant district attorney, in reply to his specific inquiry, that he was called upon to testify in a proceeding brought under the Sherman Act to protect trade and commerce against unlawful restraint and monopolies. The witness was advised that he would obtain immunity from punishment arising on account of any matter or thing concerning which he might testify or produce documentary evidence. He declined to produce the papers and documents called for in the subpoena for the reason, among others, that he had been advised by counsel that he was under no legal obligation to produce anything called for by the subpoena.

The court will notice that the subpoena in that case did refer to a specific investigation, and from the statement of the assistant district attorney there was apparently such an investigation actually under way before the grand jury, in which respect the case totally differs from the case at bar.

In his opinion Mr. Justice Brown discusses the objection made by the witness in refusing to answer questions propounded to him, that there was no specific "charge" pending before the grand jury against any particular person, by seeking to define the word "charge" as used in this connection, and held that the grand jury could proceed to investigate a matter without the formality of a written charge. He quotes with approval a portion of a lecture delivered by Mr. Justice Wilson before the students of the University of Pennsylvania, found in Wilson's Works, Vol. 2, p. 213, as follows:

“It has been alleged that grand juries are confined, in their inquiries, to the bills offered to them, to the crimes given them in charge, and to the evidence brought before them by the prosecutor. But these conceptions are much too contracted; they present but a very imperfect and unsatisfactory view of the duty required from grand jurors, and of the trust reposed in them. *They are not appointed for the prosecutor or for the court; they are appointed for the government and for the people* [italics ours]; and of both the government and people it is surely the concernment that, on one hand, all crimes, whether given or not given in charge, whether described or not described with professional skill, should receive the punishment which the law denounces; and that, on the other hand, innocence, however strongly assailed by accusations drawn up in regular form, and by accusers, marshaled in legal array, should, on full investigation, be secure in that protection which the law engages that she shall enjoy inviolate.

“The oath of a grand juryman—and his oath is the commission under which he acts—assigns no limits, except those marked by diligence itself, to the course of his inquiries: Why, then, should it be circumscribed by more contracted boundaries? Shall diligent inquiry be enjoined? And shall the means and opportunities of inquiry be prohibited or restrained?”

Justice Brown also quotes with approval the language used by Judge Addison, president of the court of common pleas, where he charged the grand jury as follows:

“If the grand jury, of their own knowledge, of the knowledge of any of them, or from the examination of witnesses, know of any offense committed in the county, for which no indictment is preferred to them, it is their duty either to inform

the officer who prosecutes for the state, of the nature of the offense, and desire that an indictment for it be laid before them, or, if they do not, or, if no such indictment be given them, it is their duty to give such information of it to the court; stating, without any particular form, the facts and circumstances which constitute the offense. This is called a presentment."

The court refers to the case of *In re Lester*, 77 Ga. 143, as holding that the powers of the grand jury are inquisitorial to a certain extent, yet that they must be exercised within certain well defined limits, and said:

"The grand jury can find no bill nor make any presentment except upon the testimony of witnesses sworn in a particular case, where the party is charged with a specified offense.

"This case is readily distinguishable from the one under consideration, in the fact that the subpoena in this case did specify the action as one between the United States and the American Tobacco Company and the MacAndrews-Forbes Company."

The learned justice thus summarizes his conclusions upon this point:

"We deem it entirely clear that under the practice in this country, at least, the examination of witnesses need not be preceded by a presentment or indictment formally drawn up, but that the grand jury may proceed, either upon their own knowledge or upon the examination of witnesses, to inquire for themselves whether a crime cognizable by the court has been committed; that the result of their investigations may be subsequently embodied in an indictment, *and that, in summoning witnesses, it is quite sufficient to apprise them of the names of the parties with respect to whom they will be called to testify, without indicating the na-*

ture of the charge against them [italics ours]. So valuable is this inquisitorial power of the grand jury that, in states where felonies may be prosecuted by information as well as indictment, the power is ordinarily reserved to courts of impaneling grand juries for the investigation of riots, frauds, and nuisances, and other cases where it is impracticable to ascertain in advance the names of the persons implicated. It is impossible to conceive that in such cases the examination of witnesses must be stopped until a basis is laid by an indictment formally preferred, when the very object of the examination is to ascertain who shall be indicted. As criminal prosecutions are instituted by the state through an officer selected for that purpose, he is vested with a certain discretion with respect to the cases he will call to their attention, the number and character of the witnesses, the form in which the indictment shall be drawn, and other details of the proceedings. Doubtless abuses of this power may be imagined, as if the object of the inquiry were merely to pry into the details of domestic or business life. But were such abuses called to the attention of the court, it would doubtless be alert to repress them. While the grand jury may not indict upon current rumors or unverified reports, they may act upon knowledge acquired either from their own observations or upon the evidence of witnesses, given before them."

It is apparent, as the Circuit Court for the Southern District of New York said in the *Shaw* and *McLaughlin* cases, *supra*, that persons called as witnesses before a grand jury are entitled to know either the names of parties against whom they are called to testify, or the nature of the charge that is made against known or unknown parties. They are entitled to know that there is a charge or proceeding of some kind pending against

some one, whether initiated by the district attorney or by the grand jury of its own motion. But it conclusively appears in the case before the court that not only was there no charge or proceeding of any kind pending before the grand jury, but that the witness was told by the officer whose duty it was to collect evidence against the parties who were about to be tried, that there was no further proceeding contemplated before the grand jury. And it also affirmatively appears that the government merely wanted the papers and records in question to make a case against the officers and employes of the Western Fuel Company when the case was reached for trial.

Mr. Justice Field charged the grand jury, *Fed. Cas. No. 18,255* (2 Sawy. 667) that:

“There is a wide difference between the powers and duties of grand juries of the state courts of California and of grand juries of the national courts,”

specifying that the former had general inquisitorial powers, while the scope of the latter field was more limited.

“The first designation of subjects of inquiry are those which shall be given you in charge; this means those matters which shall be called to your attention by the court, or submitted to your consideration by the district attorney. The second designation of subjects of inquiry are those which shall ‘otherwise come to your knowledge touching the present service’; this means those matters within the sphere of and relating to your duties which shall come to your knowledge, other than those to which your attention has been called by the court or submitted to your consideration by the district attorney. * * *

“We, therefore, instruct you that your investigations are to be limited: First, to such matters as may be called to your attention by the court; or, second, may be submitted to your consideration by the district attorney; or, third, may come to your knowledge in the course of your investigations into the matters brought before you, or from your own observations; or, fourth, may come to your knowledge from the disclosures of your associates.”

Justice Field did not include, among these duties of the grand jury, the preparation of a case for the district attorney by summoning before it witnesses, books and papers that the district attorney concluded might prove serviceable to him.

In the case of

Newgold v. American Electrical Novelty and M'fg. Co., 108 Fed. 341,

it was held by the District Court for the Southern District of New York that in a criminal action a defendant cannot be compelled to produce his books and papers before trial for examination by the plaintiff for the purpose of showing the number of penalties alleged to have been incurred, as section 724 of the Revised Statutes which authorizes a court in an action at law to order the production of books and writings which contain evidence pertinent to the issue, and where there might have been a discovery thereof by the ordinary rules of proceeding in chancery, as by a bill of discovery, does not apply to a case which involves a penalty or a forfeiture.

Again, where the documentary evidence sought for will tend to subject it to a penalty, plaintiff cannot obtain an order for its production.

In the case of

U. S. v. National Lead Co., 75 Fed. 94,

the district attorney did not have the hardihood to use the grand jury for the purpose of obtaining in advance of trial the books of the National Lead Company in order to get information as to the materials used in the shipments for which drawbacks were obtained—fraudulently it was claimed—from the government, but resorted to a notice to produce under section 724 of the Revised Statutes.

The court held that under that section

“the exercise of the power vested in federal courts to require production of such books or writings is limited to causing such production to be made at the trial,”

citing authorities to show

“that the party calling for books has no right to examine them before trial, to see whether there be not something in them pertinent to the issue.”

But the court found a more serious objection to the granting of the motion in the fact that the case was virtually of such a character that the evidence sought to be obtained by the books might, though not necessarily would, tend to subject the officers and agents of the defendant corporation to an accusation of crime.

We do not resist the production of the books and papers in the present case in reliance on that portion of

the fifth amendment to the Constitution which protects any officer or agent of the Western Fuel Company from being a witness against himself in a criminal case; but the case just cited shows that in a criminal proceeding courts will not compel a defendant to produce evidence which they would compel him to produce in the trial of a cause of a civil nature.

THE SUBPOENA VIOLATES THE FOURTH AMENDMENT.

Our fourth objection to the subpoena *duces tecum* is that by reason of its sweeping character it constitutes an unreasonable search and seizure of the Western Fuel Company's books and papers contrary to the fourth amendment to the Constitution of the United States.

While corporations have been deprived of, or rather held not to be entitled to the protection against self-crimination afforded individuals by the fifth amendment to the Constitution, it has been determined that they are entitled to the privileges contained in the fourth amendment against unreasonable searches and seizures.

Hale v. Henkel, supra.

Let me again call attention to the language of the subpoena:

“All books, papers, records and vouchers of the Western Fuel Company, a corporation, in your possession or under your control, showing the amount and weight of coal in the bunker of the Western Fuel Company situate on Folsom Street Dock

in the City and County of San Francisco on the 1st day of January, 1904, including the amount of coal in the off-shore bunker and the amount of coal in the in-shore bunker, and also showing the amount and weight of coal on the 1st day of January, 1904, in the coal yard of said Western Fuel Company connected with said bunker by a tramway and situate on East street, in said City and County of San Francisco; and also showing the amount and weight of all coal in all other bunkers and places containing, or which contained coal of the Western Fuel Company on the 1st day of January, 1904, in the State of California.

“Also all books, papers, records and vouchers of said Western Fuel Company, in your possession or under your control, showing the total amount and weight of coal delivered from said bunker, including the off-shore bunker and the in-shore bunker and delivered from said yard, between the 1st day of January, 1904, and the date hereof.

“Also all books, papers, records and vouchers of said Western Fuel Company, in your possession or under your control, showing the amount and weight of coal on this date in said bunker of said Western Fuel Company, including said off-shore and said in-shore bunker, and in said yard.

“Also all books, papers, records and vouchers of the Western Fuel Company, a corporation, in your possession or under your control, showing the amount and weight of coal in the bunker of the Western Fuel Company, situate on said Folsom Street Dock, on the 1st day of May, 1906, including the amount of coal in the off-shore bunker and the amount of coal in the in-shore bunker; and also showing the amount and weight of coal on the 1st day of May, 1906, in said coal-yard of said Western Fuel Company, and also showing the amount and weight of all coal in all other bunkers and places in the State of California containing or which contained coal of the Western Fuel Company on the 1st day of May, 1906.

“Also all books, papers, records and vouchers of said Western Fuel Company, in your possession or under your control, showing the total amount and weight of coal delivered from said bunker, including the off-shore bunker and the in-shore bunker, and delivered from said yard, between the 1st day of May, 1906, and the date hereof; also showing all coal delivered from any and all other bunkers and places containing, or which contained coal of the Western Fuel Company between the 1st day of January, 1904, and the date hereof, and also between the 1st day of May, 1906, and the date hereof.

“Also all books, papers, records and documents of said Western Fuel Company, a corporation, in your possession or under your control, showing the weight of each load of coal taken from said in-shore and said off-shore bunker and out of said yard, and out of all other bunkers and places containing, or which contained coal of said Western Fuel Company, between the 1st day of January, 1904, and the date hereof; also showing the name of the person or persons to whom each of said loads of coal was sold or delivered, the date or dates upon which each of said loads of coal was so sold or delivered, and the amount charged to the person or persons to whom each of said loads of coal was so sold or delivered, and the amount paid for each of said loads of coal so sold or delivered.

“Also all weekly, monthly and yearly financial and other reports made to the directors of the Western Fuel Company, showing the financial condition of the affairs of said company; also the minute-books of said company containing the minutes of the meetings of the directors and the minutes of the meetings of the stockholders of said company between the 1st day of January, 1904, and date hereof.

“Also all stock ledgers, stock journals and stock certificate books showing the names of the vari-

ous holders of shares of the capital stock of said Western Fuel Company on the 1st day of January, 1904, and at all times between January 1, 1904, and the date hereof.

“Also all ledgers, cash-books and papers showing the expenses incurred and paid out by said Western Fuel Company between the 1st day of January, 1904, and the date hereof, and to whom said payments were made”

It was also shown, without contradiction, by the affidavit of appellant that

“The trial of these indictments is set for Tuesday, August 26, 1913, in this court. For several weeks past the attorneys have been requiring me to make up tables, compilations, summaries and statements from these books and certain of these tables, statements and compilations are still uncompleted and these books are being made use of every day in the preparation of the defense of its officers and directors. I am informed by the attorneys, and I believe, and I therefore state, that they will continue to require the use of these books up to the time of trial which is only eight days from today.

“The purported subpoena served upon me on August 14, 1913, calls for the production of all the books the company has. To produce them would involve a suspension of the company's business. They are so numerous that it would take two express wagons to carry them out to the grand jury room. It consists of a wholesale demand for all the company's books and papers.”

The court will again bear in mind in this connection the juxtaposition of the two dates; that of the date of the subpoena, August 14, and the date of trial, August 26, in connection with this extraordinary raid on the company's records and documents.

We contend that this subpoena *duces tecum* comes within the inhibition laid down in the constitutional amendment and in the various federal decisions, not only because its issuance was unauthorized, as we have shown, but because of its sweeping demand.

In the case of *Boyd v. U. S.* to which I shall shortly again refer, it was held that constitutional provisions for the security of persons and property should be liberally construed in favor of those who are thus protected. Hence it follows that any doubt arising as to the scope of such a provision should be resolved in favor of those who were presumably intended to be thereby protected.

In the case of

Hale v. Henkel, supra,

the Supreme Court had before it a subpoena no more searching in its character, or sweeping in the scope of its demand, than that now before the court. It was contended by the witness that the subpoena was an infringement upon the fourth amendment of the Constitution as being an unreasonable search and seizure. The Supreme Court sustained this contention, Mr. Justice Brown saying:

“Applying the test of reasonableness to the present case, we think the subpoena *duces tecum* is far too sweeping in its terms to be regarded as reasonable. It does not require the production of a single contract, or of contracts with a particular corporation, or a limited number of documents, but all understandings, contracts, or correspondence between the MacAndrews & Forbes Company, and no less than six different companies,

as well as all reports made and accounts rendered by such companies from the date of the organization of the MacAndrews & Forbes Company, as well as all letters received by that company since its organization from more than a dozen different companies, situated in seven different states in the Union.

“If the writ had required the production of all the books, papers and documents found in the office of the MacAndrews & Forbes Company, it would scarcely be more universal in its operation or more completely put a stop to the business of that company. Indeed, it is difficult to say how its business could be carried on after it had been denuded of this mass of material, which is not shown to be necessary in the prosecution of this case [italics ours], and is clearly in violation of the general principle of law with regard to the particularity required in the description of documents necessary to a search warrant or subpoena. Doubtless many, if not all, of these documents may ultimately be required, but some necessity should be shown, either from an examination of the witnesses orally, or from the known transactions of these companies with the other companies implicated, or some evidence of their materiality produced, to justify an order for the production of such a mass of papers. A general subpoena of this description is equally indefensible as a search warrant would be if couched in similar terms. Ex parte Brown, 72 Mo. 83, 37 Am. Rep. 426; Shaftsbury v. Arrowsmith, 4 Ves. Jr. 66; Lee v. Angas, L. R. 2 Eq. 59.”

We may here remark that a consequence similar to that adverted to by the court would follow a compliance by Mr. Norcross with the government's demand. It is shown uncontradictedly by the evidence that the absence of these books would not only tend very seri-

ously to embarrass the company in the daily transaction of its business, but also would seriously jeopardize the interests of the parties who were about to go to trial by depriving them of the means of perfecting their defense.

In the case of

In re American Sugar Refining Co., 178 Fed.
109,

Judge Lacombe, in New York, denied a motion made by the United States Attorney to punish the American Sugar Refining Co. for contempt in failing to obey a subpoena *duces tecum* requiring it to produce certain books and papers before the grand jury.

“for the reason that the subpoena is obnoxious to the criticism which was sustained by the Supreme Court in *Hale v. Henkel*”, *supra*,—as being “‘far too sweeping in its terms to be regarded as reasonable’ ”;

and the subpoena under consideration in that case was not more obnoxious than the one now before the court.

In the case of

Lee v. Angas, Law. Rep. 2 Eq. Cases, 59,

frequently cited in this connection it was held that a subpoena *duces tecum* requiring a solicitor, not a party to the suit, to produce all papers, etc., relating to all dealings and transactions between his firm and the plaintiffs or defendants (as the case may be), for a period of thirty years, without specifying any particular documents required, was too vague, and the witness was entitled to refuse their production.

In the case of

Boyd v. United States, 116 U. S. 616, 29 L. Ed. 746,

Mr. Justice Bradley said:

“But, in regard to the fourth amendment, it is contended that, whatever might have been alleged against the constitutionality of the Acts of 1863 and 1867, that of 1874, under which the order in the present case was made, is free from constitutional objection, because it does not authorize the search and seizure of books and papers, but only requires the defendant or claimant to produce them. That is so; but it declares that if he does not produce them, the allegations which it is affirmed they will prove shall be taken as confessed. This is tantamount to compelling their production; for the prosecuting attorney will always be sure to state the evidence expected to be derived from them as strongly as the case will admit of. It is true that certain aggravating incidents of actual search and seizure, such as forcible entry into a man’s house and searching amongst his papers, are wanting; and to this extent the proceeding under the Act of 1874 is a mitigation of that which was authorized by the former Acts; but it accomplishes the substantial object of those Acts in forcing from a party evidence against himself. It is our opinion, therefore, that a compulsory production of a man’s private papers to establish a criminal charge against him or to forfeit his property is within the scope of the fourth amendment to the Constitution, in all cases in which a search and seizure would be; because it is a material ingredient and affects the sole object and purpose of search and seizure.

“The principal question, however, remains to be considered. Is a search and seizure or, what is equivalent thereto, a compulsory production of a man’s private papers, to be used in evidence

against him in a proceeding to forfeit his property for alleged fraud against the revenue laws—is such a proceeding for such a purpose an ‘*unreasonable search and seizure*’ within the meaning of the fourth amendment of the Constitution? Or is it a legitimate proceeding?”

The learned justice answered this latter question in the negative, and after quoting at length with approval from Lord Camden’s memorable discussion of the subject of searches and seizures in the case of *Entick v. Carrington*, 17 Howell’s St. Tr. 1029, he said, in speaking of the intimate relation between the fourth and fifth amendments:

“We are further of opinion that a compulsory production of the private books and papers of the owner of goods sought to be forfeited in such a suit * * * is the equivalent of a search and seizure, and an unreasonable search and seizure, within the meaning of the fourth amendment. Though the proceeding in question is divested of many of the aggravating incidents of actual search and seizure, yet, as before said, it contains their substance and essence, and affects their substantial purpose. It may be that it is the obnoxious thing in its mildest and least repulsive form; but illegitimate and unconstitutional practices get their first footing in that way, namely: by silent approaches and slight deviations from legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of person and property should be liberally construed. A close and literal construction deprives them of half their efficacy and leads to gradual depreciation of the right, as if it consisted more in sound than in substance. It is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy en-

croachments thereon. Their motto should be *obsta principiis.*”

In the case of

Ex parte Brown (Mo.), 37 Am. St. Rep. 426, the court had under consideration the twenty-third section of the bill of rights of Missouri, which is virtually the same as our fourth amendment, and said:

“The section declares that the people ought to be secure, in their papers, from unreasonable searches, and whether a subpoena *duces tecum* for papers, or search warrant for chattels, be issued, the spirit of that section demands that while in the latter case there must be probable cause, supported by oath or affirmation, with a description in the warrant of the place to be searched, or the thing to be searched for, in the other, it shall at least give a reasonably accurate description of the paper wanted, either by its date, title, substance of the subject it relates to, and that it shall be shown to the court or authority issuing the process that there is a cause pending in a court and that the paper is material as evidence in the cause. To permit an indiscriminate search among all the papers in one’s possession for no particular paper, but some paper, which may throw some light on some issue involved in the trial of some cause pending, would lead to consequences that can be contemplated only with horror, and such a process is not to be tolerated among a free people. A grand jury has a general inquisitorial power. They may ask a witness summoned before them, without reference to any particular offense which is a subject of inquiry, what he knows touching the violation of any section of the Criminal Code. Give such a body, in addition, the power to search any man’s papers for evidence of some crime committed, and you convert it into a tribunal which would soon become as odious to American citizens as the Star Chamber

was to Englishmen, or the Spanish inquisition to the civilized world.

“Here, communications, at different times within a period of fifteen months, sent or received by the parties named, are called for. The date, title, substance, or subject matter of none of them is given, and it is utterly impossible that it could have been made to appear, without more, that any of the messages were material as evidence before the grand jury. Moreover, it not only called for all messages between the parties named, but for all which may have been sent or received by either of the parties, to or from, any person on the face of the earth. A compliance with the order might have resulted in the production of confidential communications between husband and wife, client and attorney, confessor and penitent, parent and child. Matters which it deeply concerned the parties to keep secret from the world, and of no importance or value as evidence in any cause, might thus be disclosed to the annoyance and shame of the only persons interested. Incidents in the lives of members of families which the happiness and welfare of the household require to be kept secret, might be exposed, and offenses not recognizable by the law, long since committed and condoned, brought to light and hawked through the country by scandal mongers, to the disturbance of the peace of society and the destruction of the happiness of whole households. It is no answer to this that the obligation of secrecy imposed by law on grand juries would prevent such exposure. It is enough to disturb and harass a man, that twelve of his neighbors, though sworn to secrecy, have acquired knowledge diminishing their respect for him, which they had no right to obtain, and they may be the very twelve men with whom, above all others, he most desired to be in good repute. Such an inquisition, if tolerated, would destroy the usefulness of this most important and valuable mode of communication by subjecting to exposure the private

affairs of persons intrusting telegraph companies with messages for transmission, to the prying curiosity of idle gossips, or the malice of malignant mischief-makers.

“The power of a court of equity to compel a discovery by any party defendant to the suit, of any document in his possession, or fact resting in his knowledge, material to the issue on trial, bears an analogy to the subpoena *duces tecum*, and that power cannot be exercised to compel any discovery not material to the cause; and on that subject, Lord Loughborough, in *Shaftsbury v. Arrowsmith*, 4 Ves. 66, said: ‘Permitting a general, sweeping survey into all the deeds of a family, must be attended with very great danger and mischief. It may set up a title, not for the benefit of the plaintiff, but to the injury of the devisees, indulging a speculation to the prejudice of parties whose interest this court has no right to invade.’ Mr. Fonblanque in his work on Equity, says: ‘A plaintiff by this bill may without the least foundation impute to the defendant the foulest frauds, or seek a discovery of transactions in which he has no real concern; and when the defendant has put in his answer, denying the frauds or disclosing transactions (the disclosure of which may materially prejudice his interests), the plaintiff may dismiss his bill with cost, satisfied with the mischief he may have occasioned by the publicity of his charge, or the advantage he may have obtained by an extorted disclosure.’ In reference to this abuse of the proceeding he says: ‘The court alone can counteract it; and in vindication of its process, must feel the strongest inclination to interpose its authority.’ 2 Fonb. Eq. B. 6, ch. 8, sec. 1, note a. These observations are equally applicable to the subpoena *duces tecum*. The abuse of the power to compel a discovery is sedulously guarded against in equity jurisprudence, and yet ten-fold greater injury could be inflicted by means of a subpoena *duces tecum*, if it can compel a sweeping,

indiscriminate production and inspection of the papers of any party to the suit, or witness in the trial. If our bill or rights had not guarded the citizen against such an abuse of a judicial process, we would be inclined to apply to this process the wholesome restrictions which equity jurisprudence has placed upon the power of a court of equity to compel a discovery."

How truthfully may we apply these observations to the present case! It is a matter of common knowledge spread broadcast by the public prints, that the defendants in the case about to be tried have been indicted upon evidence obtained entirely by entries in their own books which were voluntarily given to the officers of the government when requested, and thereafter impounded by them for weeks at a time, with no opportunity afforded these defendants to explain how or under what circumstances these entries were made. Their very prominence in the community made them a shining mark for the accusation of fraud, which was brought against them; and with the sensationalism which was sought to be given to the case from certain official quarters, is it to be wondered at that after garbled reports had been industriously circulated broadcast, and an attempt made to create an atmosphere here distinctly hostile to the Western Fuel Company, the defendants should resent the improper use which had thus been made of the books and papers which they had voluntarily furnished to the government and insist on standing upon their legal rights by declining to give the government agents the opportunity to again pry into their business

affairs with the hope that they might find there something that could be so twisted or distorted as to be made available at least by way of innuendo, if not evidence? And while a change for the better has apparently taken place upon the advent of special counsel for the government, the experience of the defendants has been such as to teach them that their only course is to rely upon the constitutional rights which they are now invoking.

See also the case of

Ex parte Chapman, 153 F. 371,

which your Honor, Judge Gilbert decided and which is referred to in the dissenting opinion of Mr. Justice McKenna in the Wilson case, to which attention will be hereafter called.

Furthermore, when all of the company's books, papers and records are demanded by the government twelve days before all of the officers and directors and some of the principal employes of that corporation are about to go to trial under a conspiracy charge involving the entire business transacted by that company from the time of its incorporation, a reasonable course for the government to have followed, if it was in good faith seeking to implicate others in the transactions complained of, or intending to find new indictments against those already under indictment, would have been to postpone the effort before the grand jury until the trial had been concluded, and not wrest from these defendants the means whereby they proposed to assert

their innocence and explain the business transactions alleged to have been criminal.

We have heretofore stated, and we now repeat, that coming as it did upon the eve of trial, the demand contained in the subpoena under question was unreasonable by virtue of the circumstances under which it was made, regardless of the other objections which we have stated. It was as unreasonable, and we submit as violative of the rights of appellant and plaintiffs in error under the fourth amendment to the Constitution, as it would have been just before trial to have deprived any defendant of the documentary evidence upon which he relied, by forcibly raiding his premises, seizing and impounding it. If practice such as that exemplified in the case now before the court is to be tolerated as reasonable, then no person charged with the commission of a crime can feel that he will be hereafter safe in the preparation of his defense, for he may find the strong arm of the government, just before trial, stretched out to grasp and retain the means he had relied upon for his defense. No more shocking or inhuman inquisition, short of bodily torture, has ever been attempted in a civilized country to deprive a defendant of the legal weapons with which to meet his accuser.

THERE WAS NO PROPER FOUNDATION FOR THE CONTEMPT PROCEEDINGS RELATIVE TO THE CHARACTER OF THE EVIDENCE SOUGHT TO BE PRODUCED.

Our last objection to the action of the learned court below adjudging appellant guilty of contempt is that

it nowhere appears that he refused to give material or relevant evidence, or to produce documents which were material or relevant to any pending matter. This objection has been foreshadowed by a reading of several of the decisions to which the court's attention has just been called. Before a party can be adjudged guilty of contempt for failing to testify or produce books or papers, it must be shown that the witness was called upon to testify to facts, or to produce documents, which were material or relevant to the issue of any cause, and the record in this case is silent on the subject. It nowhere appears, either by presentment of the grand jury, or otherwise, that the voluminous papers called for by the subpoena *duces tecum* were, or that any of them was, relevant or material to any pending matter; and, as we have shown, there was no matter pending in which any books or papers could have been relevant or material.

It was held in

Ex parte Peck, 3 Blatchf. 113, Fed. Cas. No. 10, 885,

which, with the next three cases, is referred to in the case of *United States v. Terminal R. R. Ass'n*, to which attention has been called, that, on a motion for an attachment for an alleged contempt where the witness refused to obey a subpoena *duces tecum*, before he could be adjudged guilty of contempt:

“It must also be shown that the witness was called to testify to facts material and relevant to the issue in the cause. The court will interfere in

this summary way only to aid the plain demands of justice, and will not attach a witness for neglecting to testify without evidence that his testimony is pertinent to the case and such as the party is entitled by law to demand.”

It was said

In re Judson, 3 Blatchf. 116, Fed. Cas. No. 7,
563,

that

“Before the court will adjudge a witness to be in contempt or commit him therefor, it will require more than proof that he declines to respond to a question. It will inquire whether the question is relevant and material to the case or hearing, and also whether the witness is legally exempt from answering it.”

In the case of

Bischoffsheim v. Brown, 29 Fed. 341,

it was held that

“The books, papers and documents asked to be produced not being shown to be material or relevant, the motion for a subpoena *duces tecum* must be denied.”

In

Crocker-Wheeler Co. v. Bullock, 134 Fed. 241, the court held that the facts sought to be proven by the books which one of the parties desired to have produced by a subpoena *duces tecum*, were not relevant or material to the issues in the cause, and that for this reason the witness had a legal right to withhold them.

The government does not assert, or attempt to show either by the grand jury or by evidence, and it doesn't

know, that any of the papers called for are material or relevant to any proceeding which might be brought before the grand jury. It could not have this information because its expedition is, as we have said, purely for fishing purposes, hoping that something might be gleaned from these documents that would prove of some service to the government in the trial of the case of conspiracy.

In the case of

Morrison et al v. Sturges et al., 26 Howard's
Prac. Rep. (N. Y.) 177,

it was held that a court will not compel a discovery of books and papers unless satisfied that they contain evidence relating to the merits of the action. It is not enough that the party believes or is advised that the documentary evidence desired contains material evidence. Facts must be shown to support such belief.

Our State Supreme Court has held in

Ex parte Rowe on Habeas Corpus, 7 Cal., 181, that where a person had been committed for contempt of court in refusing to answer certain questions propounded to him by the grand jury, the commitment should state that the grand jury were inquiring into a certain question, stating what that question was; that the prisoner was sworn as a witness and certain questions asked him, which questions should be stated, and that the facts were thereupon presented to the court by the grand jury, etc.

In the case of ,

Ex parte Clarke, 126 Cal. 235,

the court stated that the question involved in the case was

“of great importance to all citizens, for it involves the constitutional right of the people to ‘be secure in their persons, houses, papers, and effects against unreasonable seizures and searche[r]s’. (Const, art. I, sec. 19.) To compel a person to deliver his books and papers to another who does not claim any ownership in them is to violate the sanctity of most important private rights, and is not to be tolerated except when warranted by some law clearly not inconsistent with the constitutional provision. As was said by Lord Camden in the celebrated case of *Entick v. Carrington*, 19 How. St. Tr. 1066, which was an action to recover damages for breaking into a private house and seizing private papers: ‘Papers are the owner’s goods and chattels; they are his dearest property, and are so far from enduring a seizure that they will hardly bear an inspection; and though the eye cannot, by the laws of England, be guilty of a trespass, yet where private papers are removed and carried away, the secret nature of these goods will be an aggravation of the trespass.’ The privacy of private books and papers is not only of inestimable value to the owner on account of various personal and sentimental reasons, but is of the greatest value also from mere business considerations; the exposure of a man’s methods of business would frequently be highly injurious to him, and, although really solvent, might produce such embarrassments as would ruin him. His right, therefore, to the sole possession and knowledge of his private books and papers is not to be violated, except where the power to do so clearly appears. In many of the states there are statutes on the subject of the production of books and papers in

court during a trial and providing in detail under what circumstances orders for their production may be made. In this state about all there is on the subject is to be found in sections 1000 and 1985 of the Code of Civil Procedure. Section 1000 provides for an order, in certain cases, upon notice, that a party to a pending action may have an 'inspection' and copy of accounts in any book or of a document of paper 'containing evidence relating to the merits of the action or the defense therein', and prescribing a certain penalty for a refusal; and there is a provision at the end of the section that it shall not be construed 'to prevent a party from compelling another to produce books, papers, or documents when he is examined as a witness'; but the proceeding in the case at bar was not under that section, and, moreover, it is applicable only to proper cases—for no one would claim that it gives unbridled license for the examination or production of all such private papers as the caprice, or curiosity or ulterior design of a party might suggest. Section 1985 provides for what is usually called a subpoena *duces tecum*, by which a witness is required to bring with him any books, documents, et cetera, 'which he is bound by law to produce in evidence'; but the proceedings in the case at bar were not under that section, and, moreover, it does not prescribe what things he is 'bound by law to produce'. It may be assumed, however, that—although we have no express affirmative statutory provisions on the subject—when a witness is in court, no matter how brought there, and discloses the fact that he has a paper, document or book which would be evidence in favor of the party desiring it, he may, in a proper case, be rightfully ordered to produce it. But it is evident that we must look to general principles of law applicable to the subject when it is to be determined in what instances a court has the power to compel a witness to give up his books and papers and disclose his private business to the world. And the ques-

tion raised here is one of power in the court, and may be inquired into on *habeas corpus*. Indeed, there is no other way in which a party deprived of his liberty as petitioner was could recover his freedom. The same principle applies as when a witness has been imprisoned for contempt for not answering a question not legal or pertinent, and it has been held by this court that in such a case he will be discharged. In *Ex parte Brown*, 97 Cal. 83, the petitioner had been ordered to produce a package of tickets and had been sent to jail for refusing to do so, and this court discharged him on *habeas corpus*, and said that 'It is the settled law of this state that no court or judge has power to punish as a contempt the violation or disregard of an unlawful order.' In *Ex parte Zeehandelaar*, 71 Cal. 238, the petitioner had been imprisoned for contempt for not answering as a witness a question not legal or pertinent to the issue, and he was discharged on *habeas corpus*. Several concurring opinions were delivered in the case; and it was held not only that the petitioner could not be punished for refusing to answer the question, but that the commitment must show affirmatively that the question was legal and pertinent to the issue. (See, also, *Ex parte Rowe*, 7 Cal. 181.) *And a witness can no more be lawfully imprisoned for refusing to produce papers and books which he cannot legally be required to produce, than he can be for refusing to answer questions not proper to be asked* [italics ours].

"In the case at bar, we are satisfied that the order in question was unauthorized. There was no showing by affidavit or otherwise that the books in question contained any evidence material to plaintiff's case; the only evidence on the point was the testimony of petitioner when on the witness stand as plaintiff's own witness, and that showed that they did not contain such evidence. In *Morrison v. Sturges*, 26 How. Pr. 179, the court say: 'It is not enough that the party believes or

is advised that the paper contains material evidence. The facts must be shown to support such belief.' Moreover, it was in effect a general omnibus order for the production of all defendant's books, which has always been held to be unauthorized; for, while it named certain books, yet those constituted all of defendant's books, as appears from plaintiff's examination of petitioner as to what books the defendant had. Again, the order was in the nature of what Lord Chancellor Hardwicke, over a century ago, called 'a mere fishing bill', and such bills have been universally condemned. It is quite evident that these books were not required to be produced for the direct purpose of introducing them in evidence. Plaintiff would not have offered them or any part of them in evidence unless he found something in the part offered that was relevant and material in support of his side of the case; and indeed, they would not have been otherwise admissible. He merely intended to draw his dragnet of inspection through all these books under the ostensible motive of trying to catch something which his witness had testified was not there. In the meantime, all the private business of the defendant—all its dealings with persons other than plaintiff, its methods of conducting its affairs, perhaps its financial condition and other matters vitally important to its welfare—would have been exposed. There is no warrant in the law for such a forcible wholesale violation of a person's privacy upon such a showing as was made in this case. A man does not lose all his civil rights because he is brought into court as a party to a suit. As was said by Lord Hatherley: 'A court is bound to protect the defendant against undue inquisition into its affairs' (L. R. 7 Ch. App. 97, and notes); and it would be difficult to imagine a more striking instance of such 'undue inquisition' than an order compelling a defendant to produce for inspection all his books upon the mere suspicion—against positive evidence

to the contrary—that they might possibly contain some evidence favorable to the plaintiff, and without pointing to any particular part of all these books over which this suspicion was supposed to hover.

“The authorities on the subject are innumerable. Many of them arose out of discussions of the old ‘bill of discovery’, and many out of later statutory provisions; but the principles which they declare are clearly to the point that such an order as is here under review is unauthorized. Originally, an order for the production of a paper, document, or book was made only when the document was one declared on in the bill or set up as a defense; or where the party asking for it had an interest in the document itself—as where it was a contract between the parties, and there was only one copy of it which was in the hands of the opposite party; or where the instrument was, in the very nature of things, material evidence, as where it was alleged to have been forged or altered, and that it would on its face show the fact alleged; or where books belonged to both parties and would necessarily contain evidence of the issues pending—as in case of a suit between partners, or generally between principal and agent or trustee and beneficiary. (See 2 Phillips on Evidence, Cowen & Hill’s and Edwards’ notes, c. IV, 321, and notes.) Afterward, such orders were undoubtedly extended so as to include other grounds for production of papers, and were in many states, as hereinbefore noticed, regulated by statutes and rules of court; but the principles applicable generally to the forced production of papers are declared in the authorities as above stated, and we have been referred to no case warranting such an order as the one now under review. The subject, in all its bearings, both at common law and under recent statutes, is fully discussed in 2 Wait’s Practice, commencing at page 522, where a very large number of authorities touching the question are cited. Many

cases are there cited to the point that there must be a substantial showing that the document or book sought for contains material evidence in support of the cause of action, or defense, of the party asking for it; and that such a mere suspicion as appeared in the case at bar will not warrant an order for production. But the principle which is determinative of the invalidity of the order involved in the case at bar is stated on page 533, where the author says: 'The right given by statute to discover books, papers, and documents relating to the merits of a pending action does not entitle a party to enter into a mere fishing examination of all the books, papers, and documents of his adversary. An inquisitorial examination was not contemplated by the framers of the statute.' (Citing authorities.) In *Hoyt v. American Exchange Bank*, 8 How. Pr. 93, the court said: 'He has no right to have a general inquisitorial examination of all the books, papers, and documents of his adversary with a view to ascertain if, perchance, something cannot be found which will probably aid him.' There are numerous authorities to the same point."

Much reliance is placed by the learned court below, and by special counsel for the government, upon the case of

Wilson v. United States, 221 U. S. 361 (55 L. Ed 771);

but a comparison of the record and of the opinion in that case with the facts of the case at bar discloses several vital points of difference.

In the first place, the subpoena *duces tecum* in the Wilson case specified that a charge or proceeding was pending before the grand jury with respect to which the required documentary evidence was to be used, and

stated what it was; while in the case at bar, as I have said, the subpoena *duces tecum* does not state that any charge or proceeding was pending before the grand jury, and, in fact, none was. The first head note in the report of the *Wilson* case is misleading in this respect.

In the second place, the subpoena in the *Wilson* case merely called for the production of letter press copy books of the United Wireless Telegraph Company containing copies of letters and telegrams covering only a period of two months, May and June, 1909, while in the case at bar the demand is, as we have shown, of the most sweeping character, being *omnibus* in its description of, and calling for, all books, papers, records and vouchers of the Western Fuel Company covering a period of nearly ten years, embracing virtually the entire business transacted by that corporation from the first day of January, 1904, virtually when it commenced to do business, to the 14th day of August, 1913, and all the weekly, monthly, and yearly financial and other reports made to the directors of the company showing the financial condition of the affairs of that company, as well as the minute books containing the minutes of the meetings of directors, minutes of the meetings of stockholders from the first day of January, 1904, to the 14th day of August, 1913, and all the stock ledgers, stock journals and stock certificate books, with all the information therein contained between those dates, as well as all ledgers, cash books and papers showing expenses incurred and paid out by the Western Fuel Company in the course of its business between

those dates. The demand made in the Wilson case was more than reasonable; it was modest. The demand made in the present case was immodest, unreasonable, outrageous.

In the third place, and with reference to that portion of the opinion in the Wilson case in which Mr. Justice McKenna wrote a very vigorous dissenting opinion, that is on the question of the production of corporate books, it will be noticed that the subpoena *duces tecum* there called for the production by Wilson of certain letter press copy books of the corporation of which he was president and had control; and much of the opinion of the majority of the court is taken up with the discussion of the question as to whether or not Wilson could properly refuse to produce these books, which were not his own, simply because in them were contained copies of his private correspondence, whose production would tend to incriminate him, as he was under investigation. The court observed that the subpoena did not seek to reach his private correspondence, and, furthermore, that he could not make the books of the corporation his private or personal books by using them for his personal, as well as the corporate, business. The ground of the court's decision upon this phase of the case was that the books belonged to the corporation, and not to Wilson, and that neither it, nor he on behalf of the corporation, could invoke the protection of the fifth amendment against self-crimination. The opinion summarizes the conclusion reached in the following language:

“That demand [contained in the subpoena *duces tecum*], expressed in lawful process, confining its requirements within the limits which reason imposes in the circumstances of the case, the corporation has no privilege to refuse. It cannot resist production upon the ground of self-crimination. * * * It could not depend upon the question whether or not another was accused. The only question was whether, as against the corporation, the books were lawfully required in the administration of justice.”

Then, again, in that case Wilson was adjudged in contempt of court and committed to the custody of the marshal

“until he shall cease to obstruct and impede the United Wireless Telegraph Company from complying with the subpoena *duces tecum* attached to the above-mentioned presentment, or otherwise purge himself from this contempt.”

He was specifically charged by the grand jury with
“preventing the corporation from complying with the process”.

He was obstructing the administration of justice by preventing someone else from obeying the process of the court. He was not technically adjudged guilty of contempt for refusing to produce records of which he had the sole control. The directors of the United Wireless Telegraph Company had voted to comply with the subpoena and had directed Wilson to surrender the required letter press books, which the latter refused to do.

In the present case, however, the demand for the books is made upon the owner, to wit: Western Fuel Company through its secretary, the appellant herein, upon whom the subpoena was served, and he has acted throughout, not in an individual capacity, but wholly as secretary and on behalf of the Western Fuel Company. Neither that company, nor its secretary, resists the production of the books on the ground that they would tend to incriminate anyone, including themselves, which was the express ground of refusal alleged in the Wilson case, and which the court declined to sanction for the reason that a corporation cannot avail itself of the fifth amendment to the Constitution with respect to self-crimination; and Wilson could not assert this alleged privilege for the corporation. Appellant and plaintiffs in error here are third parties to the main controversy between the United States and the directors and certain employes of that company, and the rights the former assert are with respect to their own property and on behalf of themselves, and not on behalf of, or with respect to, the property of others.

We respectfully insist that, to use the language of Mr. Justice Hughes in the Wilson case, the government's demand for documentary evidence must be

“expressed in lawful process, confining its requirements within the limits which reason imposes in the circumstances of the case”,

and that these books and records must be

“lawfully required in the administration of justice”.

So that we, as well as the learned court below and counsel for the government, rely upon the Wilson case as sustaining our contention.

The cases of

Wheeler v. United States, Adv. Sheets U. S.

Sup. Ct. of Feby. 15, 1913, p. 150;

Shaw v. Same, same reference, and

Grant v. Same, Adv. Sheets U. S. Sup. Ct. of

Feby. 15, 1913, p. 190,

do not throw additional light on the subject. In the first two cases the corporation whose books and papers were demanded had become defunct and hence no constitutional right could have been invoked on its behalf. Furthermore, it was the parties who were under investigation by the grand jury who were claiming that the protection afforded to them of the fourth and fifth amendments extended to these records, a claim which the court declined to sustain.

In the case last cited, it was held that certain books of a defunct corporation entrusted to an attorney by his client could not be withheld from the grand jury by the attorney on the ground that they would incriminate his principal.

CONCLUSION.

Does the practice of the government in the cases now before the court conform to the judicial definition of the grand jury as an adjunct of the court? Is this use of the grand jury compatible with the theory that it stands between the government and the people?

It was the writs of assistance issued to revenue officers of the Crown in the Colonies that, more than anything else, brought on the war of Independence.

James Otis, we are told in *Boyd v. U. S.*, pronounced them "the worst instruments of arbitrary power, the most destructive of English liberty and the fundamental principles of law, that ever was found in an English law book"—and the famous debate in which these words occurred—in Boston in February, 1761—was the principal event which inaugurated the resistance of the Colonies to the oppressions of the Mother Country. "Then and there", said John Adams, "then and there was the first scene of the first act of opposition to the arbitrary claims of Great Britain. Then and there the child Independence was born."

"*Obsta principiis*" was the warning cry of Mr. Justice Bradley in that case against encroachment upon constitutional privileges; and we may well conclude by repeating the language of Mr. Justice McKenna in the Wilson case:

"A limitation by construction of any of the constitutional securities for personal liberty is to be deprecated. A people may grow careless and overlook at what cost and through what travail they acquired even the least of their liberties. The process of deterioration is simple. It may even be conceived to be advancement, and that intelligent self-government can be trusted to adapt itself to occasion, not needing the fetters of a pre-determined rule. It may come to be considered that a constitution is the cradle of infancy, that a nation grown up may boldly advance in confident security against the abuses of power, and that passion will

not sway more than reason. But what of the end when the lessons of history are ignored, when the barriers erected by wisdom gathered from experience are weakened or destroyed? And weakened or destroyed they may be when interest and desire feel their restraint. What, then, of the end? Will history repeat itself? And this is not a cry of alarm."

We respectfully submit that for the reasons we have given the judgment of the court below should be reversed in both the Norcross and the Western Fuel cases.

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IN THE
United States Circuit Court of Appeals
For the Ninth Circuit.

DAVID C. NORCROSS,

Appellant,

VS.

UNITED STATES OF AMERICA,

Appellee.

No. 2329

In the Matter of the Application of
David C. Norcross for Writ of
Habeas Corpus.

DAVID C. NORCROSS,

Plaintiff in Error,

VS.

UNITED STATES OF AMERICA,

Defendant in Error.

No. 2328

WESTERN FUEL COMPANY,
(a corporation),

Plaintiff in Error,

VS.

UNITED STATES OF AMERICA,

Defendant in Error.

No. 2327

REPLY OF THE ASSISTANTS TO THE ATTORNEY
GENERAL, TO ARGUMENT MADE BY MR.
SAMUEL KNIGHT, ON BEHALF OF
APPELLANT AND PLAINTIFFS
IN ERROR.

The record shows (pp. 5-6) that prior to the proceedings here under review, three indictments had been presented to the District Court of the Northern District of California, by the grand jury, two in the November term, 1912, and the third during the March term, 1913. The defendants named in each of these three indictments were John L. Howard, James B. Smith, J. L. Schmitt, Robert Bruce, Sidney V. Smith, F. C. Mills, E. H. Mayer and Edward J. Smith, "all of whom are and were officers or employees respectively of said Western Fuel Company" (p. 6). Neither in the petition for the writ of habeas corpus, nor elsewhere in the record, is it shown which or how many of the parties under indictment were officers of said corporation, nor which of the parties were employees other than officers of said Western Fuel Company. The three indictments designated Exhibits "H", "I" and "K" are set out at pages 43 to 76 of the record. Exhibit "H" charges that the eight named defendants, on the first day of January, 1904, conspired among themselves and "with divers other persons whose names are to the grand jurors aforesaid, unknown, and for that

reason not herein set forth, to defraud the United States.”

It is next recited that the eight named conspirators and their fellow conspirators, under the guise and name of the Western Fuel Company, conspired to defraud the United States of import duties due on coal imported by said Western Fuel Company, and by others, by making and causing to be made, false weights and returns of coal thus imported, and further to defraud the Government by false weights and returns of coal loaded on vessels of the Pacific Mail Steamship Company and other vessels of American register, to the end that a greater rebate on drawback on coal duties might be secured from the Government.

The conspiracy of the eight named defendants, with other unknown fellow conspirators, is charged to have been in effect and operation from January 1, 1904, down to the 24th day of February, 1913.

Overt acts in execution of this conspiracy to defraud the Government, are charged in connection with coal loaded on vessels of the Pacific Mail Steamship Company, and the Toyo Kaisen Kaisha Company, and payments of bribes to the extent of two and one-half cents per ton are charged to have been made by defendants to engineers of vessels named in the indictment, in furtherance of the conspiracy, and for the purpose of concealing the facts from the Government.

Exhibit "I" alleges a similar continuing conspiracy from April 1, 1906, to February 18, 1913, among the same eight named defendants and with unnamed fellow conspirators, with a view to defrauding the Government out of import duties, and securing greater drawbacks on coal loaded on vessels of American register after being received at this port.

Exhibit "K" charges a like continuing conspiracy from April 1, 1906, to June 18, 1913, among the eight named defendants, and with unknown fellow conspirators, for the same general purpose of defrauding the Government alike in the matter of import duties and the drawbacks allowable where the coal was reloaded on vessels of American register.

Each indictment specifically charges conspiracy among the eight named defendants, and further charges that the conspiracy to defraud the Government involved other active conspirators than the eight named officers and employees of the Western Fuel Company.

After the filing of these indictments and in the month of August, 1913, subpoenas *duces tecum* were issued (pp. 39-43) out of the office of the Clerk of the United States District Court, requiring Norcross, as secretary of the Western Fuel Company, to produce before the grand jury all books, papers, records and documents of the company in use during the period of the conspiracy,

showing the coal received by the company, and likewise showing to whom the coal imported was subsequently delivered. The subpoenas, while confined to the period of the conspiracies, were so comprehensive in their terms that their validity was questioned on that ground, on the theory that enforced compliance with their terms would constitute an unreasonable seizure and search in contemplation of the fourth amendment to the Constitution of the United States.

It may be well to note here that no claim is made in this record on behalf of either appellant, or plaintiff in error, that any self incrimination, prohibited by the fifth amendment to the Constitution of the United States is involved in the proceedings.

At page 80 of his argument, Mr. Knight thus refers to this matter:

“In the present case, however, the demand for the books is made upon the owner, to wit: Western Fuel Company, through its secretary, the appellant herein, upon whom the subpoena was served, and he has acted throughout, not in an individual capacity, but wholly as secretary and on behalf of the Western Fuel Company. Neither that company nor its secretary, resist the production of the books on the ground that they would tend to incriminate any one, including themselves, which was the express ground of refusal alleged in the Wilson case, and which the court declined to sanction for the reason that a corporation cannot avail itself of the fifth amendment to the Constitution with respect to self-incrimination, and Wilson could not assert this alleged

privilege for the corporation. *Appellant and plaintiffs in error here are third parties to the main controversy between the United States and the directors and certain employees of that company*" (italics ours), "and the rights the firm assert are with respect to their own property and on behalf of themselves, and not on behalf of or with respect to the property of others."

In obedience to the subpoena, Norcross, the secretary, appeared before the grand jury on the 12th and 14th days of August, 1913, and was sworn as a witness (record pp. 81, 95).

It is admitted, as shown by the record at the pages indicated (pp. 81, 95), that on the occasions of the attendance by Norcross before the grand jury, he read a paper stating his ground for refusing to produce the records, in the following form:

"I have been instructed by counsel that I am not obliged, under this subpoena, to testify before the grand jury, nor to produce the books and papers of the Western Fuel Company accordingly; and without any disrespect to the grand jury, I must decline to testify further, or to produce the books and papers until the court has passed upon the matter."

Before Judge Dooling, Norcross further represented as follows:

(82) "It seems to me that it would be unreasonable to expect the company to turn over all of its books and especially at this time when the defendants have need of the

books and are making continual and daily use of them in preparing for their on-coming trials. * * * I have been informed by counsel, and upon such information and belief state the fact to be that a grand jury has no right to institute a new or supplemental investigation in the hope of eliciting additional testimony to supplement or strengthen the testimony upon which indictments have already been found, or in an attempt to aid the prosecutors in the trial of their case. Indictments should not have been returned in the first instance unless there was sufficient evidence on which to predicate them."

The witness, Norcross, at the same time, made further suggestions as to why, in his judgment, the grand jury should not be allowed an inspection of the books and papers covered by the subpoena.

In consequence of the stand taken by Norcross before the grand jury, a presentment was submitted by that body to the District Court, shown at pages 25 to 27 of the record, and known as Exhibit "C".

Among other things, that presentment shows that—

"in pursuance of said subpoena, said D. C. Norcross, as secretary of said Western Fuel Company, a corporation, appeared before said grand jury, at a session then being duly held by said grand jury, and was then and there duly sworn, by the foreman of said grand jury *to testify as a witness in an investigation then being pursued by said grand jury, concerning certain frauds alleged to have been*

perpetrated and committed by said Western Fuel Company against the United States (italics ours).

“That said D. C. Norcross, as secretary of said Western Fuel Company, a corporation, *refused to produce before said grand jury any of the books, papers or documents* described and referred to in said subpoena, and during said session of said grand jury, said D. C. Norcross, as secretary of said corporation, informed said grand jury that he, *as secretary of said corporation, would not, in obedience to said subpoena, produce said books, papers and documents, or any of them* (italics ours).

“That said D. C. Norcross, as such secretary, heretofore testified before said grand jury that he was, and had been, for many years, the secretary of said Western Fuel Company, a corporation, and that as such secretary he had, and still had the possession, custody and control of all said papers, records and documents referred to in said subpoena, excepting certain of said records destroyed in the fire of April 18, 1906, and that *he would not produce before said grand jury, in obedience to any subpoena served upon him, said books, records or papers, or any of them.*”

In speaking of the documents sought to be produced under the subpoena, Mr. Knight, at page 65 of his argument says:

“It is a matter of common knowledge spread broadcast by the public prints, that the defendants in the case about to be tried, have been indicted upon *evidence obtained entirely by entries in their own books which were voluntarily given to the officers of the Government* when requested, and thereafter impounded by them for weeks at a time, with no

opportunity afforded these defendants to explain how or under what circumstances these entries were made. * * *

“Is it to be wondered at that * * * the defendants should resent the improper use which had thus been made *of the books and papers which they had voluntarily furnished to the Government*, and insist on standing on their legal rights by declining to give the Government agents the opportunity to *again pry into their business affairs* with the hope that they might find there something that could be so twisted or distorted that could be made available at least by way of innuendo, if not evidence?”

At page 66, in speaking of the conduct of the Government, Mr. Knight says:

“A reasonable course for the Government to have followed, if it was in good faith *seeking to implicate others in the transactions complained of, or intending to find new indictments against those already under indictment*” (italics ours) would have been to postpone the effort before the grand jury and not wrest from these defendants *the means whereby they propose to assert their innocence, and explain the business transactions alleged to have been criminal.*”

At page 5 of his argument, referring to the books covered by the subpoena, which Norcross had failed to produce, Mr. Knight says:

“*The company had previously furnished the Government with all of its records which the latter had asked for.*”

After the presentment submitted by the grand jury, a hearing was had in the District Court be-

fore Judge Dooling. At the hearing an effort was made by counsel for Norcross and the Western Fuel Company to show that no charge against any person was pending before the jury when Norcross was sworn, and that no investigation of any pending or contemplated charge was in progress.

At page 91 of the record it appears that in response to a question by Mr. Knight, Mr. Sullivan, of counsel for the Government, said:

“To a certain extent there was a proceeding pending before the Grand Jury because Mr. Norcross had attended before the grand jury on two occasions before that and he was sworn and questioned and testified to a certain extent.

“Mr. KNIGHT. We merely want to get the fact before the court * * * that there was no proceeding *against these defendants, or any of them, pending nor had any charge been made against these defendants, or any of them, to the grand jury, at the time of the service of these subpoenas* (italics ours).

“(92) Mr. SULLIVAN. I will admit that at the time the subpoena was served there were no *formal proceedings pending against the Western Fuel Company, or against any of the defendants named in the indictment. That is as far as the Government will go. But I will state in good faith to counsel that there are other parties involved in this fraud who have not yet been indicted. And I will state that it is the intention of the Government to ascertain to what extent these other parties have been involved, and if their action is criminal, then the Government will take such course as it deems proper in the premises.*”

Following his investigation of the facts, Judge Dooling rendered a judgment which is shown at pages 18 to 24 of the record. Among other things Judge Dooling finds as follows:

(20) "In pursuance of said subpoena, said D. C. Norcross, as secretary of said Western Fuel Company, a corporation, appeared before said grand jury and was then and there duly held by said grand jury, and was then and there duly sworn by the foreman of said grand jury to testify as a witness *in an investigation then being pursued by said grand jury concerning certain frauds alleged to have been perpetrated against the United States*; that said D. C. Norcross, as secretary of the Western Fuel Company, a corporation, refused to produce before said grand jury at said time and place *and during such session, or during any other session of such grand jury, any of the books, papers, records, vouchers or documents referred to in said subpoena*; and during said session of said grand jury said D. C. Norcross, as secretary of the Western Fuel Company, a corporation, informed said grand jury and the members thereof, that *he would not, in obedience to said subpoena, produce said books, papers, records, vouchers and documents or any of them.*"

It is further shown at page 21 of the record that Norcross

"refuses to and will not produce before said grand jury, at any session to be held thereof, in obedience to *said subpoena so duly served upon him, or any other subpoena*, said books, papers, records, vouchers and documents, or *any of them*".

Said judgment further recites at page 23 that:

“said D. C. Norcross, as secretary of the Western Fuel Company, a corporation, although at all of said times having ability so to do, wilfully and contumaciously refused, and still refuses to obey said subpoena, or said order of this court, or to produce before said grand jury said books, papers, records, vouchers and documents, *or any of them*, so within his possession, or under his control”.

The entire conduct of Norcross and of the company, in the proceedings before the grand jury and before Judge Dooling, shows that the stand had been deliberately taken under advice of counsel; that no further production of any book, paper, record or document theretofore exhibited to the grand jury should be made either to the grand jury or the court, prior to the trial of the indictment theretofore filed against these eight named defendants.

Following the hearing before Judge Dooling and his judgment, a further opportunity was given for the production of the documents before the grand jury, which neither Norcross nor the company availed of, and finally the penalties for contempt were imposed by Judge Dooling.

The legal contentions made by Mr. Knight are:

(1) That there was no order or application to any court or judge for the issuance of a subpoena *duces tecum*;

(2) That the subpoena mentions no proceeding pending before the grand jury with reference to

which the production of the required documents was sought;

(3) That no charge had been presented to the grand jury, nor was any charge or investigation pending before that body with reference to which the documents sought were to be offered in evidence;

(4) That if the subpoena were properly issued, its terms were so broad as to constitute an unreasonable search and seizure in contemplation of the fourth amendment to the Constitution of the United States;

(5) That it does not appear that the documents covered by the subpoena were material or relevant to any charge or investigation pending before the grand jury.

We shall endeavor to take up the questions presented, in the order indicated by counsel:

I.

THE ISSUANCE OF THE SUBPOENA DUCES TECUM BY THE CLERK OF THE DISTRICT COURT, DURING THE SESSION OF THE GRAND JURY, AND FOR ITS PURPOSES, WAS AUTHORIZED BY LAW.

At page 11, Mr. Knight, as a heading for a subdivision of his argument, states the following proposition: "The issuance of the subpoena *duces tecum* was not properly authorized." The first sentence of his argument on that proposition is:

“The first reason assigned by us for maintaining that the subpoena was void is that it was not properly authorized or issued.”

At page 10, in stating the same proposition, counsel uses this language:

“1st. There was no order of, or application to any court or judge for the issuance of the subpoena *duces tecum*.”

The essential proposition thus stated by counsel in varying form, as we understand it, and as we shall deal with it in this subdivision of our argument, is purely one of *practice or procedure*.

As justifying our attitude toward the question and our understanding of counsel's position, we ask attention to the language used by him at pages 26 and 27 of his argument:

“I pass by this point without further discussion because it is the least important point in the case and only concerns the question of procedure; for if counsel for the Government could make a proper showing to the court below, that they were entitled to the subpoena *duces tecum* that court would undoubtedly make the necessary order.”

Inasmuch as counsel devoted nearly seventeen printed pages of argument to the question, we shall ask attention to the provisions of the law and some adjudications construing sections of the Revised Statutes of the United States, which are involved.

The power to compel the production of written evidence is as essentially inherent in a tribunal as

the power which enables it to compel the attendance and oral evidence of living witnesses.

The power to compel the production of written evidence is equally, if not more important than the power to compel the sworn language of a living witness.

In this connection we ask attention to some of the suggestions made by Mr. Chief Justice Marshall, sitting as circuit justice during the proceedings connected with the indictment by the grand jury and trial of Aaron Burr in the Circuit Court for the District of Virginia in the year 1807. Application had been made there to Judge Marshall to order the issuance of a subpoena *duces tecum* addressed to the president of the United States, compelling the production before the grand jury of certain documents desired by Burr in and of his defense. The particular proceedings to which we invite attention is case No. 14692 D, 25 Fed. Cas. 30, 34, 35. At page 34, the chief justice says:

“It remains to inquire whether a subpoena *duces tecum* can be directed to the president of the United States, and whether it ought to be directed in this case? This question originally consisted of two parts. It was at first doubted whether a subpoena could issue in any case to the chief magistrate of the Nation and if it could, whether that subpoena could do more than direct his personal attendance; whether it could direct him to bring with him a paper which was to constitute the gist of his testimony. While the argument was opening the attorney for the United States

avowed his opinion that a general subpoena might issue to the president, but not a subpoena *duces tecum*.

* * * * *

“(35) The court can perceive no legal objection to issue a subpoena *duces tecum* to any person whatever, provided the case be such as to justify the process. * * * A subpoena *duces tecum* varies from an ordinary subpoena only in this: that a witness is summoned for the purpose of bringing with him a paper in his custody. In some of our sister states, whose system of jurisprudence is erected on the same foundation with our own, this process, we learn, issues of course. * * * It has been truly observed that the opposite party can, regularly, take no more interest in the awarding a subpoena *duces tecum* than in the awarding an ordinary subpoena. * * * *He can no more object regularly to the legal means of obtaining testimony, which exists in the papers, than in the mind of the person who may be summoned. If no inconvenience can be sustained by the opposite party, he can only oppose the motion in the character of an amicus curiae, to prevent the court from making an improper order, or from burdening some officers by compelling an unnecessary attendance. This court would certainly be very unwilling to say that upon fair construction the constitutional and legal right to obtain its process, to compel the attendance of witnesses, does not extend to their bringing with them such papers as may be material in the defense.”*

The court there held that the subpoena *duces tecum* might be issued even to compel the production of papers by the president of the United States.

In considering the cases cited by Mr. Knight, as well as those suggested by ourselves, we ask the court to note the terms of the various provisions of the federal statutes under which the issuance of a writ has been allowed and in which the writ, after issuance, may have been quashed. The basic statutory provision under which writs of subpoena have been issued in the courts of the United States, is Section 716 Revised Statutes.

The language of that section is as follows:

“The Supreme Court and the Circuit and District Courts shall have power to issue writs of *scire facias*. They shall also have power to issue all writs not specifically provided for by statute which may be necessary for the exercise of their respective jurisdictions, and agreeable to the principles of law.”

In re Storrer, 63 Fed. 564-66.

That was a motion to quash a subpoena *duces tecum* issued to the superintendent of the Postal Telegraph Company, requiring him to appear and produce before the United States grand jury certain telegraphic messages. District Judge Morrow, in passing on the application, said:

“The authority of the courts of the United States to issue subpoenas *duces tecum* appears to be derived from Section 716 of the Revised Statutes of the United States, which provides that the Supreme Court and the Circuit and District Courts shall have power to issue ‘all writs not specifically provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to

the usages and principles of law. *At common law, every court having the power to hear and determine any suit had the inherent power to call for all adequate proofs of the facts in controversy; and to that end to summon and compel the attendance of a witness, and if the witness was expected to produce any books or papers in his possession, a clause to that effect was inserted in the writ which was then termed 'subpoena duces tecum'.* 1 Greenl. Ev. Section 309; 3 Bl. Comm. 382. The writ was of compulsory obligation. *Amey v. Long*, 9 East. 473."

In this same connection we ask attention to
American Lithograph Co. v. Werchmeister,
 221 U. S. 608, 610.

In that case, Mr. Justice Hughes, speaking for the court, in discussing evidence afforded by books whose production in evidence had been compelled, by subpoena *duces tecum*, used this language:

"Without attempting to state in detail the proceeding which culminated in the introduction of the book entries in evidence, it is sufficient to say that after a review of the course of the trial, and of the directions and rulings of the court during its progress, we are satisfied that the enforced production of the books cannot properly be said to rest upon an order made under section 724, but that in fact they were produced under a subpoena *duces tecum* served upon the company's officer.

"But, it is urged, that the books were those of a party to the action, and hence that the limitations of section 724 must be deemed controlling; that in actions at law this section excludes all other modes of compelling pro-

duction of books or writings by the adversary party.

“Under Section 14 of the Judiciary Act of 1789 (Sec. 716, Rev. Stat.) power was conferred upon the federal courts to issue all writs not specifically provided for by statute, which may be necessary for the exercise of their respective jurisdictions and agreeable to the practice and usages of law. *This comprehended the authority to issue subpoenas duces tecum for ‘the right to resort to means competent to compel the production of written, as well as oral, testimony, seems essential to the very existence and constitution of a court of common law.’* *Amey v. Long*, 9 East. 484, Section 724, which was originally section 15 of the Judiciary Act of 1789, was to meet the difficulty arising out of the rules relating to parties at common law and to provide, by motion, a substitute *quoad hoc* for a bill of discovery in aid of a legal action.”

* * * * *

“*It was not the purpose of Section 724 to interpose an obstacle to the exercise of the general power of the court with respect to the issuance of subpoenas duces tecum, and that was not its effect.* The barrier, in the case of parties, existed independently of the provisions of the section and by these it was sought to mitigate the resulting inconvenience. When, however, the rule as to parties was changed it followed that the obstacle was removed and by virtue of the general authority of the court, subpoenas *duces tecum* may run to parties as well as to other—leaving those who are subpoenaed to attack the process if of improper scope or lacking in definiteness, or to assert against its compulsion whatever privileges they may enjoy. See *Merchants’ National Bank v. State National Bank*, 3 Cliff. 203, 204; *Nelson v. United States*, 201 U. S. 92.

"We conclude, therefore, that no question arises under *section 724, which cannot be regarded as providing an exclusive procedure.* The subpoena was valid; and the books called for were produced."

Section 724, Revised Statutes,

is in this language:

"POWER TO ORDER PRODUCTION OF BOOKS AND WRITINGS IN ACTION AT LAW.

"In the trial of actions at law, the courts of the United States may, *on motion, and due notice thereof*, require the parties to produce books or writings in their possession or power, which contain evidence pertinent to the issue in cases and under the circumstances where they might be compelled to produce the same by the ordinary rules of proceeding in chancery. *If a plaintiff fails to comply with such order, the court may, on motion, give the like judgment for the defendant as in cases of non-suit; and if a defendant fails to comply with such order, the court may, on motion, give judgment against him by default.*"

That section deals with what is commonly known as a motion to produce, directed by one party to the action, to his adversary, as distinguished from a subpoena *duces tecum* addressed to a witness as such requiring him to produce documents under his control, whether he be a party or not. The distinction between the two methods of enforcing the production of documentary evidence is noted in the language of Mr. Justice Hughes in the Werckmeister case, as above quoted. *The method* of securing the production in Section 724 is specifically

pointed out by the statute, as likewise *the penalty* for failure to comply with the notice. The party desiring production of books or writings under that section, must give his notice of motion as required by the section. If either party desires, as against the other, the enforcement of the statutory penalty, he must follow the statutory procedure pointed out before he can enforce the statutory penalty.

No such restricted mode of procedure is pointed out by Section 716 nor by any other provisions of the United States Statutes, as to the issuance by the court of a subpoena *ad testificandum* or a subpoena *duces tecum*. A subpoena of either class, without restriction or limitation by way of motion or notice therefore may be issued by the clerk as of course.

In this connection we ask attention to the case of
*Johnson Steel Rail Co. v. North Branch
 Steel Co.*, 48 Fed. 191-2.

It was sought in that case to punish for contempt, a witness who had refused to produce documentary evidence in response to a subpoena *duces tecum*. In discussing the question presented, Judge Reed said:

“It was argued that the subpoena had improperly issued from the clerk’s office, that a subpoena *duces tecum* in such a case as the present, could only be issued by order of court upon petition or application of one of the parties. A circuit court in one district has

power, under the 67th rule in equity, to appoint a special examiner to take testimony in another district. * * *

“Nor do I think it necessary that in such a case an application must be made to the latter court for an order directing a subpoena *duces tecum* to issue, but *such a subpoena may be issued in the usual manner from the clerk’s office as in ordinary cases.*

(1) “If documents, the production of which is desired, are in the possession of one not a party to the suit, he may be compelled by a subpoena *duces tecum* to produce them, and if the subpoena is not obeyed, he will be punished for contempt on proof by affidavit that the documents are in his custody.’ 3 *Greenl. Ev.* 305. *Such subpoena is in ordinary and general use and is of compulsory obligation and effect in courts of law, and also in courts of equity;* and by the 78th rule in equity, subpoenas may be issued by the clerk in blank, and filled up by the commissioner, master, or examiner, requiring the attendance of the witness at the time and place specified, and this applies as well to subpoenas *duces tecum*. Section 869 of the Revised Statutes, providing for an order of court, upon which the subpoena *duces tecum* shall issue, applies to cases where depositions *de bene esse* are taken under the provisions of Section 863, or *in per petuam rei memoriam* and under a *dedimus potestatem*, under Section 866. It does not apply to testimony taken, as in the present case, under the general powers of a court of equity, and in the mode prescribed by the equity rules. An examination of the act of January 24, 1827, the second section of which was re-enacted as Section 869 of the Revised Statutes, shows that it was not intended to apply to all cases.”

Section 869 referred to by Judge Reed in the case last cited, points out the procedure to be followed in cases of depositions *de bene esse* under 863 R. S., and in depositions taken under a *dedimus potestatem, in perpetuam rei memoriam* under Section 866 R. S. In those cases the statute contemplates that the party shall apply in the first instance to a judge for the issuance of the subpoena. But the preliminary application contemplated by Section 869 does not apply to the ordinary subpoena compelling attendance in courts of law, or compelling a witness to produce documents in his custody.

At page 14 of his printed argument, Mr. Knight, in discussing this question of procedure cites *Dancel v. Goodyear Shoe Machinery Co.*, 128 Fed. 153. An examination of the case shows that it is not in point. That was a petition for an order directing a clerk to issue a subpoena *duces tecum* for the taking of a deposition *de bene esse* under Section 863 R. S. No question of the necessity of a preliminary application was there involved. The matter before the court was the showing to be required *by the court* before it would *make its order* directing the clerk to issue the subpoena *duces tecum*.

The Boyd case, cited on page 12, was not a question of procedure at all. That was an information by the United States attorney in a case of seizure and forfeiture under Section 5 of the Revenue Act of June 22, 1874, which authorized

the court, on motion of the Government attorney, to require the defendant, or claimant of goods under seizure by the Government, to produce in court his private books, invoices and papers under a penalty that the allegation of the Government attorney should be taken as confessed and the goods involved finally subjected to forfeiture. The Supreme Court held the law unconstitutional, as being repugnant to the fourth and fifth amendments to the Constitution.

We have already shown by the language quoted from Mr. Knight's argument that the fifth amendment is not here in question. So far as the fourth amendment, referring to unlawful search and seizure is concerned, a discussion of that question, so far as appropriate, to the argument, falls properly under another subdivision, III, of this argument.

For this reason we shall not here consider the case of *Hale v. Henkel*, 201 U. S., cited by counsel at page 12.

The case of

U. S. v. Tilden, 10 Ben. 566, Fed. Cas. No. 16,522,

cited by Mr. Knight and also by Judge Colt in the Dancel case, decides nothing pertinent to the question of procedure here under consideration.

The full scope of the decision there made is indicated by the syllabus, which is in the following language (28 Fed. Cas. p. 174):

“A witness examined *de bene esse* under Rev. St. U. S. Sec. 863, may be compelled to produce books and papers in his possession which would be material and competent evidence for the party calling him, upon the trial of the cause, but he cannot be compelled to produce his books and papers merely for the purpose of refreshing his memory.”

It appeared in that case that the Government attorney conceded that the books and papers referred to were not competent evidence in the pending cause.

At page 18 of his argument, Mr. Knight refers to another case cited by Judge Colt,

Edison Electric Light Co. v. U. S. Electric Light Co., 44 Fed. 294.

The case is clearly not germane to the present discussion of our point of procedure. The gist of the decision is indicated by the following excerpt from the opinion (299-300):

“The refusal of the company’s officers to produce the documents in question under subpoenas *duces tecum* cannot therefore be excused upon the theory that they are privileged communications. The specific relief prayed for on this application is for an order—

“That the complainant consent that the commissioner of patents furnish to the defendant’s solicitors, at their expense, a certified copy of the file wrapper and contents of the pending application for letters patent filed in the patent office of the United States by Thomas A. Edison on the 15th day of December, 1880, the same being a division of an earlier application known as the ‘paper car-

bon application', filed by the said Edison on or about December 11, 1879, or, in lieu thereof, at complainant's option, that complainant produce, for the examination of defendant's counsel, and for use as evidence herein, if defendant be so advised, the full text, either original papers or copies, of said application, and of all correspondence in relation thereto which has passed between the patent office and the said Edison, or the complainant herein, or his or its attorneys.'

"Sufficient ground for the making of such an order, if it be within the power of the court to make it, is not shown. It does not appear that the commands of the subpoena *duces tecum* will not be ample to obtain such evidence as that described in the motion."

The case cited on page 22 (*U. S. v. Terminal R. Ass'n*, 154 Fed. 268) does not deal with the question of the issuance of a subpoena *duces tecum* by the clerk without preliminary application to the court. As a matter of fact, application had there been made to the court for the issuance of a subpoena *duces tecum*. Judge Finkelnburg, to whom the application was originally addressed, held that the showing of materiality made by the Government on its application for the writ was sufficient, and refused to quash the writ (148 Fed. 468-490). Subsequently District Judge Trieber, on motion to quash the same writ, held that the facts showing the materiality of the testimony in connection with the application for the writ were not sufficiently set out in the affidavit to enable the court to determine for itself the materiality and for that reason he granted the motion to quash.

At page 23, counsel cites *U. S. v. Hunter*, 15 Fed. 712. This case does not deal directly with the question of procedure here under consideration. The question there before the court arose on a motion to quash a subpoena *duces tecum* already issued to a witness in charge of a telegraph office, requiring production by him of telegrams sent or received at that office between certain specified dates. The motion was based on the grounds (1) of uncertainty of the subpoena; (2) irrelevancy to any proceeding or prosecution pending before the grand jury; (3) unwarranted disclosure without consent of parties, of contents of telegrams; (4) production of documents protected from disclosure by public policy. No reference whatever will be found in the case to any suggestion that a necessary preliminary to the issuance of a subpoena *duces tecum* by the clerk was an affidavit showing the materiality on an application to the court for a direction that the clerk issue the writ.

We make the additional suggestion that the ruling in the *Hunter* case is distinctly at variance with the rule followed by Judge Morrow in the *Storrer* case, above cited by us.

It would unduly extend this argument to take up each of the other cases cited by Mr. Knight under this heading. A thorough examination and analysis of each case would show that no case cited by him deals directly with the question of mere procedure or practice, to which we have endeavored to confine this section of our argument. We in-

sist that a subpoena *duces tecum*, requiring attendance and production of documents before a grand jury may be issued as of course by the clerk without any preliminary application therefor, by affidavit, motion or otherwise, to the court, in connection with which the grand jury is exercising its functions. Of course we realize that the court has control of process of this character, as of all other process and in a proper case, and on sufficient showing, may interfere with any unwarranted abuse of such process.

The general rule on this subject of summoning witnesses is thus referred to in

20 Cyc., 1342.

“The right to call witnesses before the grand jury is recognized both at common law and under statute; a very usual practice being for the prosecuting attorney to have such witnesses summoned as he believes necessary to support the bills to be laid before the grand jury.”

In speaking of the requisites of a subpoena *duces tecum*, the same authority says:

40 Cyc., 2169,

“Ordinarily a subpoena *duces tecum* is granted as of course and issued by the clerk of the court, although in some cases an order of court for the issuance of the process is required.’

The rule is thus referred to in

Thompson & Merriam on Juries, Sec. 640.

“WITNESSES CALLED IN DISCRETION OF PROSECUTING OFFICER. It is not usual for the court to give directions regarding witnesses to be called before the Grand Jury. The prosecuting attorney sends such as he believes to be necessary.”

To like effect see

State v. Wolcott, 21 Con. 279;

State v. Barnes, 23 Tenn., 5 Lea. 398-400;

O’Hair v. The People, 32 Ill. App. 277.

II.

THE AUTHORITY OF THE GRAND JURY TO EXAMINE ORALLY WITNESSES PERSONALLY PRESENT OR WRITTEN EVIDENCE PHYSICALLY PRODUCED, DEPENDS NEITHER ON THE SUGGESTION IN THE SUBPOENA, OF THE EXISTENCE OF A PENDING CHARGE OR PARTY CHARGED, NOR ON THE ANTECEDENT INITIATION OF AN INVESTIGATION BY THE GRAND JURY OF ITS OWN MOTION, OR OTHERWISE.

At page 10 of his printed argument, Mr. Knight says:

“Second. The subpoena does not state that there was any proceeding of any character pending before the grand jury for which the attendance of the witness, or the production of the books, papers and documents called for was required. No reference is made in the subpoena to any proceeding whatsoever before the grand jury.

“Third. No charge of any kind whatsoever had been presented by special counsel for the government, or by the district attorney, to the grand jury, nor was any charge then pending against anyone, or any investigation in any way, directly or indirectly, requiring the books, papers and records, or any of them, specified in the subpoena *duces tecum*, or in which any of these books or records could furnish any evidence, nor had the grand jury before it, of its own initiation, any proceeding of any kind whatsoever involving any matter or thing referred to in the subpoena.”

At page 27 his position on this matter is again stated in this language:

“There was no proceeding pending before the grand jury. The second and third objections which I have heretofore stated to the validity of the subpoena *duces tecum* may, for the sake of brevity, be considered together. These objections are that not only does the subpoena itself fail to state that any proceeding was pending before the grand jury, but as a matter of fact there was no proceeding of any kind so pending.”

At page 49 of his argument, counsel says:

“Persons called as witnesses before a grand jury are entitled to know either the names of parties against whom they are called to testify, or the nature of the charge that is made against known or unknown parties.”

The essential question here involved is rather one of personal privilege than one of power in a duly constituted tribunal to compel the presence of persons or papers.

To appreciate properly the cases cited under either or both of the second and third points suggested by Mr. Knight, it may be well to consider the nature of a grand jury as an independent functional factor in the administration of the criminal law, in aid of the courts of the United States.

A proceeding before a grand jury is not an action, either civil or criminal. A federal grand jury has the power and jurisdiction, in advance of any formal charge made by a prosecuting officer, to investigate on its own initiation or otherwise, as to whether any crime has been committed within the territorial jurisdiction of the court in whose aid it exercises its functions.

An early case in which the functions of a federal grand jury were discussed is

U. S. v. Hill, Case No. 15364; 26 Fed. Cas. 317.

There Mr. Chief Justice Marshall, sitting in the Circuit Court of the Virginia District for the May term of 1809, thus expressed himself:

“It has been justly observed that no act of congress directs grand juries, or defines their powers. By what authority, then, are they summoned, and whence do they derive their powers? The answer is, that the laws of the United States have erected courts which are invested with criminal jurisdiction. This jurisdiction they are bound to exercise, and it can only be exercised through the instrumentality of grand juries. They are therefore, given by a necessary and indispensable impli-

eration. But, how far is this implication necessary and indispensable? The answer is obvious. Its necessity is co-extensive with that jurisdiction to which it is essential. *Grand juries are accessories to the criminal jurisdiction of a court, and they have power to act, and are bound to act, so far as they can aid that jurisdiction'*" (italics ours).

In 1852 Mr. Justice Nelson, sitting in the Circuit Court for the Northern District of New York, in the case of

U. S. v. Reed, Case No. 16134; 27 Fed. Cas. 727, 737,

speaking of procedure before federal grand juries said:

"There are no authorities to be found in the English books upon this question; as the mode of proceeding before the grand jury in England, in finding bills of indictment, differs from the practice usually adopted in this country. There, the indictment is drawn by the proper officers before the case is presented for examination, and the witnesses are sworn in the particular case. *Here, the initiation of the proceedings is by swearing the witnesses and sending them before the grand jury, and the bill is drawn after they have agreed upon it. There is no cause pending in court, or even before the grand jury, in the legal sense of the term, at the time the witnesses are sworn, and, in consequence, no title to the proceedings can properly be given, or be necessary to the validity of the oath. If the person to be accused before the grand jury is named, it is simply for the purpose of giving application to the oath, or to the evidence under it; and, as we have seen, this application has been regarded*

as sufficiently direct and explicit *when the oath is administered generally, and as relating to all persons concerning whom charges are to be made before that body*" (italics ours).

U. S. v. Brown, Fed. Cas. 14671, Vol. 24, p. 1273-4.

That case arose in the Oregon District of the Ninth Circuit before Deady, District Judge. It was there sought to quash an indictment on the ground that it had been found by the grand jury on the testimony of some of the parties indicted, in violation of the statute which provided that "a defendant in a criminal action cannot be a witness for or against himself, nor for or against his co-defendant." Several of the parties jointly indicted had been examined before the grand jury in the investigation which resulted in the indictment. In disposing of the motion to quash the indictment, Judge Deady said:

"I cannot conceive of any one being a defendant until some distinct action or proceeding known to the law has been commenced against him, to which he then becomes a party and in which he is entitled to be heard as soon as he is brought into court, or chooses to appear. Section 11 of the Criminal Code provides substantially that a criminal action is commenced when the indictment is found and filed with the clerk. So in U. S. v. Reed, cited above, it was held that while an investigation was going on before the grand jury touching a particular charge, there was no cause pending in court or before that body in the legal sense of the term. There are, in fact

or law, no defendants or co-defendants to an investigation before a grand jury touching an alleged or supposed commission of crime.

* * * * *

“Neither of these defendants was charged with the commission of a crime until after this investigation had ceased, and the indictment was filed in court. Then for the first time in a legal sense they were accused of the commission of a crime. Section 48 only applies to cases when a party has been duly charged with the commission of crime before a committing magistrate and held to answer. In such a case the grand jury are called upon to inquire whether the defendant in this criminal proceeding before the magistrate is *prima facie* guilty, as charged, and indorse the indictment accordingly. But in a general inquiry instituted by a grand jury for the purpose of ascertaining who committed a particular crime, or whether a crime was committed at all, it would be impossible to apply section 48, without stopping the inquiry at the threshold. The grand jury cannot know at once who will be the person put on trial for the crime, and who will be his co-defendants if any, and therefore cannot know if the testimony of either would be incompetent on the trial on that account, and for that reason not to be received by them on the investigation.”

Thompson & Merriam on Grand Juries,
Sec. 626.

In speaking of the different form of oath administered under the English practice from that here administered, this authority says:

“In England, a bill of indictment is prepared in the case of each accused person, and

sent to the grand jury as the basis of their investigations. With us, the charge is made, fully considered and sustained by the grand jury before a formal indictment is drawn. As a result, in England 'each witness, before he leaves the court, is sworn that the evidence he shall give to the grand inquest upon the bill of indictment against the defendant, shall be the truth, the whole truth, and nothing but the truth.' *Under our system, there is no cause pending in court, or even before the grand jury, in the legal sense of the term, at the time the witnesses are sworn, and, as a consequence, no title to the proceedings can properly be given, or be necessary to the validity of the oath.* In other words, a general form of oath, to give evidence touching criminal charges to be laid before the grand jury, *without reference to any particular person, is sufficient."*

The same authority, in discussing the manner in which indictments of the grand jury originate, in section 611, says:

"Indictments, however, originate with the grand jury in a variety of ways, which will now be noticed: 1. By the court giving a matter of general notoriety specially in charge. 2. By the exercise of powers, *ex officio*, of the prosecuting officer. 3. From the knowledge of the grand jury. 4. By the exercise of general or special inquisitorial powers by that body."

* * * * *

The same authority, in section 614, in speaking of presentment upon knowledge of the grand jury, on the grounds of this knowledge, says:

“The grand jury, from the earliest times, has preferred charges founded upon the knowledge of members of the body.”

In 1868, Mr. Chief Justice Chase, sitting as Circuit Justice in the District of West Virginia, *30 Fed. Cas. 980*, thus charged the grand jury:

“Your general duties are sufficiently defined by your oath. * * * The same oath binds you to diligent inquiry as well as true presentment.

“You will not acquit yourselves of these obligations by slight or careless investigation. You must not be satisfied by acting upon such cases only as may be brought before you by the district attorney, or by members of your body to whom knowledge of particular offenses may have come. Your authority and your duty go much further. You may, and *you should, summon before you officers of the government, and others whom you may have reason to believe possess information proper for your action, and examine them fully.* Officers connected with the collection of internal revenue—collectors and assessors and their subordinates—may with special propriety be thus examined.

“In respect to the mode and extent of your inquiries, your own good sense will be your best guide. The district attorney will always be ready to aid you with information on matters of law; and the court also will take pleasure in responding to any inquiries you may see fit to make.”

This language of the Chief Justice addressed to the grand jury shows clearly that that body was not only permitted, but expected under their oaths, to

exercise inquisitorial powers. They were informed it was their duty to consider not only matters submitted to them by the district attorney, but also to institute original investigations on their own account, to determine whether criminal offenses had been committed within the territorial jurisdiction of the court.

A charge frequently referred to in the discussion of the oath of grand jurors, and the scope of the investigation properly within the functions of such bodies, is that given by Mr. Justice Field in the Circuit Court of the California District in August, 1872, 30 Fed. Cas. 993-4.

At page 993, the grand juror's oath is set forth in the following language:

"You, as foreman of this inquest for the body of the District of California, do swear that you will diligently inquire and true presentment make, of such articles, matters and things as shall be given in your charge, *or otherwise come to your knowledge, touching the present service.* The Government's counsel, your fellows', and your own, you shall keep secret; you shall present no one for envy, hatred or malice; neither shall you leave any one unrepresented for fear, favor, affection, hope of reward or gain, but shall present all things truly as they come to your knowledge, according to the best of your understanding. So help you God.

* * * * *

"The Government has appointed the District Attorney to represent its interests in the prosecution of parties charged with the commission of public offenses against the laws of

the United States. He will, therefore, appear before you, and present the accusations which the Government may desire to have considered by you. He will point out to you the laws which the Government deems to have been violated; and *will subpoena for your examination such witnesses as he may consider important, and also such other witnesses as you may direct.*

* * * * *

“How far you should proceed to inquire into other matters than such as are brought to your consideration by the Government, through its prosecuting officer, the District Attorney, has been a matter of much conflict of opinion among different judges.

* * * * *

“Your oath requires you to diligently inquire, and true presentment make, ‘of such articles, matters and things as shall be given you in charge, *or otherwise come to your knowledge touching the present service.*’

“The first designation of subjects of inquiry, are those which shall be given you in charge; this means those matters which shall be called to your attention by the court, or submitted to your consideration by the district attorney. The second designation of subjects of inquiry are those which shall ‘*otherwise come to your knowledge touching the present service;*’ this means those matters within the sphere of, and relating to your duties which shall come to your knowledge other than those to which your attention has been called by the court, or submitted to your consideration by the district attorney.

“*But how come to your knowledge?*

“Not by rumors and reports, *but by knowledge acquired from the evidence before you, or from your own observations. Whilst you*

are inquiring as to one offense, another and a different offense may be proved, or witnesses before you, may, in testifying, commit the crime of perjury.

“Some of you, also, may have personal knowledge of the commission of a public offense against the laws of the United States, or of facts which tend to show that such an offense has been committed, or possibly attempts may be made to influence corruptly or improperly your action as grand jurors. If you are personally possessed of such knowledge, you should disclose it to your associates; and if any attempts to influence your action corruptly or improperly are made, you should inform them of it also, and they will act upon the information thus communicated as if presented to them in the first instance by the district attorney.

“But unless knowledge is acquired in one of these ways, it cannot be considered as the basis for any action on your part.

“We, therefore, instruct you that your investigations are to be limited. First, to such matters as may be called to your attention by the court; or, second, may be submitted to your consideration by the district attorney; or, third, may come to your knowledge in the course of your investigations into the matters brought before you, or from your own observations; or, fourth, may come to your knowledge from the disclosures of your associates.

“You will not allow private prosecutors to intrude themselves into your presence, and present accusations. Generally such parties are actuated by private enmity, and seek merely the gratification of their personal malice.

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“You are also to keep your own deliberations secret; you are not at liberty even to state that you have had a matter under consideration. Great injustice and injury might be done to the good name and standing of a citizen if it were known that there had ever been before you for deliberation the question of his guilt or innocence of a public offense. You will allow no one to question you as to your own action or the action of your associates on the grand jury.”

This charge of Mr. Justice Field to the California grand jury indicates equally with that of Chief Justice Chase the duty of the grand jurors to conduct original investigations on their own account. The only limitation imposed by the learned justice, to the scope of their inquiry—to the extent of their inquisitorial powers—was that they should not permit private prosecutors, as a means of wreaking individual vengeance, to invade the precincts of the grand jury for the purpose of making accusations in matters not otherwise called to the attention of the jurors. We ask special attention to the binding obligation of secrecy as to matters and citizens under investigation in view of the persistent claim of counsel that the grand jury is under necessity of specifying in its process of subpoena the name of the party under investigation and the character of the charge which may possibly at a later date be the basis of an indictment.

O’Hair v. The People, 32 Ill. App. 277.

In that case a witness had been served with a subpoena a few days before the court convened for

the term during which the grand jury was about to be called upon to sit. After the service, he left the state and remained away until after the discharge of the grand jury, at whose session the subpoena had required his attendance. The state's attorney procured from the court an attachment upon which the witness was brought into court and fined. From the decision of the court in imposing this fine in consequence of his contempt in disobeying the process, the witness appealed. In sustaining the judgment imposing the fine, the Appellate Court said:

“No statute directly authorizes the issuing of subpoenas in such cases, nor has our attention been called to any adjudicated case where this precise question was involved. It is insisted by counsel for appellant that no power exists in the state's attorney to cause subpoenas to be issued prior to the organization of the grand jury; that there is no cause or action in existence authorizing the issuance of subpoenas until the grand jury has actually begun the investigation of an alleged offense. This, in our judgment, is a misapprehension of the relative powers and duties of the state's attorney and the grand jury.”

The judgment was there affirmed.

State v. Wolcott, 21 Con. 279.

In that case the court said:

“Grand juries have a right to investigate offenses and present bills of indictment against persons at large, as well as those in custody or on bail. *They have a right to originate charges against offenders without forewarning them of proceedings against them.*”

INQUISITORIAL POWERS OF GRAND JURY.

Under our American system, the grand jury exercises inquisitorial powers. As a matter of necessity, in the exercise of such power, it must investigate matters in advance of and prior to the formation of any specific charge against a designated person supposed to be guilty under such charge.

A recent New York case is entitled

In re Osborne, 117 N. Y. S. 169, 171-5.

At pages 170-1, the court said:

“Grand jurors are ‘clothed by the common law with inquisitorial powers, and of their own motion may make full investigation to see whether a crime has been committed, and, if so, who committed it. They may investigate on their own knowledge, or upon information of any kind derived from any source deemed reliable, may swear witnesses generally, and may originate charges against those believed to have violated the criminal laws.’

* * * * *

“The material inquiry in this connection is, not what was the purpose of the district attorney in causing the alleged subpoenas to be issued, but what was the nature of the inquiry which the grand jury was consciously entering upon. There is nothing to show that in the matter of these subpoenas the grand jury had any other purpose than to discharge the duties devolved upon them by law.

* * * * *

(175) “A defendant may be indicted under a fictitious name, and, when his real name becomes known, this may be inserted in the indictment. (Code Cr. Proc. Sec. 277; and,

where such discovery is only made at the trial, witnesses subpoenaed to attend the trial must of necessity be subpoenaed in a cause entitled in the fictitious name. *It is plain, however, that no witness can decline to obey a subpoena upon such a ground.* It is plain that, if a grand jury did not know a defendant's name at the time of making an investigation with a view to determining whether or not an indictment should be found, and it were, nevertheless, required in such case to use the accused's true name in a subpoena, they could subpoena no witnesses because of lack of such knowledge.

* * * * *

“The form of subpoena in the federal courts is not prescribed by statute; and it is, therefore, appropriate that the federal courts should do by rule and decision that which in this state is done by statute, namely, prescribe the form of the writ.”

A case which in its final stages assumed national importance on account of its decision by the Supreme Court, was first determined by the Circuit Court in the Southern District of New York. It is entitled

In re Hale, 139 Fed. 496.

In that case the witness had been served with a subpoena *duces tecum* to appear before the federal grand jury. He declined to testify on the ground

“1. That *the grand jury could only investigate specific charges against particular persons*, and as there was not any proceeding of that nature before them and no cause of action of any kind whatever pending in the court, they were not in the exercise of proper authority in

prosecuting the investigation when petitioner was before them, and consequently *he could not be lawfully required to testify or give evidence.*”

Petitioner also alleged that enforcement of the subpoena was in violation of his rights under the fourth and fifth amendments to the Constitution.

In discussing the objection that no specific charge was under investigation, the court said:

(498) *“The authority and functions of a grand jury in the courts of the United States in investigating criminal offenses are not prescribed by statute, but are such as inhere in that body by the general sanction of the common-law courts. That a grand jury is not confined to the investigation of an alleged offense to which their attention has been called by the court, or which has been laid before them in an indictment, or an information by the prosecuting attorney of the court, or which is within the personal knowledge of some of the members, is the generally accepted opinion of the courts of this country, unless in some of the states where there may be statutory restrictions to the contrary. As said by Mr. Justice Brewer in Frisbie v. The United States, 157 U. S. 160., 15 Sup. Ct. 586, 39 L. Ed. 657:*

“In this country the common practice is for the grand jury to investigate any alleged crime, no matter how or by whom suggested to them, and, after determining that the evidence is sufficient to justify putting the party suspected to trial, to direct the preparation of the formal charge or indictment.”

“That they may investigate into offenses which may come to their knowledge, other than those to which their attention has been called

by the court, or which have been submitted to their consideration by the district attorney, is shown by the observations of Mr. Justice Field in a carefully considered charge to the grand jury in the United States Circuit Court for the District of California. 2 Sawy. 667 Fed. Cas. No. 18,255. That a grand jury has certain inquisitorial powers—and by this is meant the power of instituting an investigation to discover whether a particular crime has been committed—is also a proposition which has been frequently affirmed by the courts of this country.”

While in some particulars Circuit Judge Wallace disagreed with the action of another Judge of the same circuit as to some of the principles involved, he nevertheless refused to discharge the prisoner on habeas corpus. The appeal from his action is reported in 201 U. S. 43 et seq., under the title

Hale v. Henkel.

The case was presented in the United States Supreme Court by Mr. DeLancey Nicoll and associates. The report of the argument, as shown at page 47, indicates that the following points were presented to the Supreme Court:

“There were no facts authorizing the Circuit Court to entertain *any charge against appellant*. Unless the grand jury in prosecuting the investigation acted within its jurisdiction, the court had no authority to punish the witness for his supposed contumacy in refusing to answer questions (citing cases).

“*No judicial matter was pending in the Circuit Court* when appellant was required to attend before the grand jury, or when the orders

of May 5 and May 8 were made, in or upon which he could lawfully be required to testify or produce evidence.

“Notwithstanding the subpoena said ‘in a certain action,’ *no action was pending*; there can be no action, prosecution or criminal proceeding, until after someone has been formally accused of acts constituting a criminal offense by indictment or by information.

“*Nor was there any particular charge against the corporations named in the subpoena duces tecum, or under investigation.* The grand jury was merely engaged in an effort to find out whether they had or had not transgressed the Sherman Act.

“An *ex parte* investigation, based upon mere suspicion, without any complaint or charge, and that may be without result, is not a ‘case’ or ‘controversy’ within the meaning of the Constitution (citing cases).

“The grand jury was not in the exercise of its proper and legitimate authority in prosecuting the alleged investigation; consequently its requirement, and the orders of the court, based upon it and the witness’s refusal, were *coram non judice* and void.”

At pages 58 and 59 Mr. Justice Brown speaking for the court says:

“The appellant justifies his action in refusing to answer the questions propounded to him, 1st, upon the ground that there was *no specific ‘charge’ pending before the grand jury against any particular person.*”

At page 62 the learned justice continues:

“While no case has arisen in this court in which the question has been distinctly presented, the authorities in the state courts

largely preponderate in favor of the theory that the grand jury may act upon information received by them from the examination of witnesses *without a formal indictment, or other charge previously laid before them.*"

At page 63, after quoting the language of Mr. Justice Brewer, above quoted, Justice Brown continues:

"There are doubtless a few cases in the state courts which take a contrary view, but they are generally such as deal with the abuses of the system, as the indiscriminate summoning of witnesses with no definite object in view and in a spirit of meddlesome inquiry."

At page 65 the justice continues:

"We deem it entirely clear that under the practice in this country, at least, the *examination of witnesses need not be preceded by a presentment or indictment formally drawn up, but that the grand jury may proceed, either upon their own knowledge or upon the examination of witnesses, to inquire for themselves whether a crime cognizable by the court has been committed*; that the result of their investigations may be subsequently embodied in an indictment, and that in summoning witnesses it is quite sufficient to apprise them of the names of the parties with respect to whom they will be called to testify, without indicating the nature of the charge against them. So valuable is this inquisitorial power of the grand jury that, in States where felonies may be prosecuted by information as well as indictment, the power is ordinarily reserved to courts of impanelling grand juries for the investigation of riots, frauds and nuisances, and other cases where it is *impracticable to ascer-*

tain in advance the names of the persons implicated. It is impossible to conceive that in such cases the examination of witnesses must be stopped until a basis is laid by an indictment formally preferred, when the very object of the examination is to ascertain who shall be indicted."

The power of the grand jury is, beyond all question, in the view of the United States Supreme Court, an inquisitorial power. The law cannot require the absurdity that a specific charge shall be pending against a particular person before a witness may be summoned for an investigation, where the very existence of the charge can only follow as the ultimate result of the investigation and the testimony given by the witnesses. The law cannot require that the process by which the attendance of a witness shall be compelled, shall specify the name of the party, then unknown, who may be subsequently determined to be the object of an indictment found by the grand jury as a result of the investigation. A specific charge involves definiteness, both as to the party and the offense charged. Neither is possible in advance of the investigation or the inquisitorial examination proper to be made by a grand jury.

Wilson v. United States, 221 U. S. 361.

In that case the witness, as in the case at bar, declined to answer questions before the grand jury on the ground that no specific charge was pending. The contention of the witness was overruled. The

first subdivision of the syllabus, which is fully borne out by the decision, is in this language:

“Hale v. Henkel, 201 U. S. 43, followed to the effect that a witness properly subpoenaed cannot refuse to answer questions propounded by the grand jury, on the ground that there is no cause or specific charge pending.”

Among the cases cited by counsel for the contemnor in that case was *In re Shaw*, 172 Fed. 520, which is the same case cited by counsel at pages 39 and 49 of his argument, under the title *In re McLaughlin*, 172 Fed. 520. Mr. Justice Hughes who delivered the opinion of the court, in speaking of this question said:

“Wilson then petitioned for a writ of habeas corpus alleging that the commitment was illegal for the reasons (1) that the court was without jurisdiction to entertain the charge of contempt, (2) that there was *no ‘cause’ or ‘action’ pending in the court between the United States and any party mentioned in the subpoena*, in which the petitioner could be required to testify or give evidence.”

At pages 371-2, the justice continues:

“We may first consider the objections to the validity of the subpoena and then the claim of privilege.

“The objections to the jurisdiction on the ground that there was no ‘cause’ or ‘specific charge’ pending before the grand jury were made and answered in *Hale v. Henkel*, 201 U. S. 43, and require no further examination.”

At page 49 of his argument, Mr. Knight says:

“It is apparent, as the Circuit Court for the Southern District of New York said in the Shaw and McLaughlin cases, *supra*, that persons called as witnesses before a grand jury are entitled to know either the names of the parties against whom they are called to testify, or the nature of the charge that is made against known or unknown parties.”

In response to a suggestion of this kind in the Wilson case, Mr. Justice Hughes said:

“It is said that, under the form of writ used in this case, the defendant in the prosecution which might follow an indictment by the grand jury would not be apprised of the name of the precise witness who might have appeared against him, and section 829 of the Revised Statutes and the Sixth Amendment of the Federal Constitution are invoked. The contention ignores the fact that *the writ calls for books and not for oral testimony; and, aside from this, neither the constitutional provisions nor the statute accords the right to be apprised of the names of the witnesses who appeared before the grand jury.* Even in cases of treason and other capital offenses, under section 1033 of the Revised Statutes, the required *list of witnesses is only of those who are to be produced on the trial*” (citing cases).

Hale v. Henkel and *Wilson v. United States* were followed by the Circuit Court for the Southern District of New York in the case entitled

In re Born Hat Co., 184 Fed. 506,
that case was affirmed on appeal by a memorandum opinion shown at 223 U. S. 714.

THE FACTS OF THE PENDENCY OF AN INVESTIGATION BEFORE THE GRAND JURY, THE MATERIALITY OF THE DOCUMENTARY EVIDENCE REFERRED TO IN THE SUBPOENA, AND THE REASONABLENESS OF THE TIME ALLOWED NORCROSS TO PRODUCE THE DOCUMENTS WERE MATTERS PROPERLY DETERMINABLE BY THE DISTRICT COURT AND NOT PROPERLY REVIEWABLE HERE.

The grand jury in its deliberations, it is true, acts to some extent independently of the court, but it is nevertheless unquestionably an adjunct or appendage of the court, aiding it in the administration of the criminal law. It has no power to adjudge contempts or to punish the same. Where a witness already sworn and present within the acknowledged jurisdiction of the inquisitorial body, declines to observe either his duty to testify or to produce documents whose production is ordered by it, the only way to penalize him for his contumacy is to report his conduct to the court and ask, at the hands of the court, the appropriate order in the premises. The punishable contempt here in question was the final refusal of Norcross to comply with the order of the District Court made after the hearing and the finding by Judge Dooling that Norcross, the contemnor, had appeared before the Grand Jury and been sworn, and testified to some extent, and been directed by the court to produce the documents before the grand jury.

We have contended, and still contend that there was no defect in the form or substance of the subpoena so far as its function was to insure the per-

sonal' presence of Norcross. He was physically within their presence and subject as a witness to the proper direction of the grand jury. If he had not been subpoenaed at all, being personally present and being a competent witness, it certainly was within the power and function of the grand jury to cause him to be sworn as a witness. If any seeming or substantial defect existed in the subpoena so far as securing his personal presence was concerned, the process was *functus officio*. It is no defense on the part of a contumacious witness who receives an order properly made by a court, that he had not been served with a subpoena requiring his attendance, or that the subpoena served upon him was defective in form or substance.

If he is before the court, a competent witness, the court, in the exercise of its unquestioned powers, may cause him to be sworn. If he be sworn, he is equally, with any other witness, subject to the proper order or direction of the court. Neither to the grand jury, nor to the court, was Norcross in a position to claim that his stand before the court and jury was not that of a witness subject to such orders as might be properly addressed to him. In speaking of a witness who defied the authority of a grand jury, the California Supreme Court said in

In re Gannon, 69 Cal. 543,

“There is no doubt that a grand jury is part of the court by which it is convened, and that it is under the control of the court; and

there is just as little doubt that a witness who appears before it is subject to the lawful authority and control of the court in the same manner and to the same extent as are witnesses before a trial jury. The court has, therefore, jurisdiction to deal with a witness who defies the authority of the grand jury, and to adjudge him guilty of contempt of court for such conduct, and punish him; and if no excess of jurisdiction appears in the proceedings, or which resulted in the conviction and punishment, the judgment rendered is final and conclusive, and not the subject of review."

The judgment of contempt here under attack shows (20-2) that on said 14th day of August, 1913,

"said D. C. Norcross, as secretary of said Western Fuel Company, a corporation, appeared before said grand jury and was then and there being duly held by said grand jury and was then and there duly sworn by the foreman of said grand jury to testify as a witness in an investigation then being pursued by said grand jury concerning certain frauds alleged to have been perpetrated against the United States".

The record further shows that on the 14th day of August the court gave and made its order directing the witness to show cause on the 18th day of August why he should not be punished for contempt. It is further shown at page 22 that on September 3, 1913, after a full hearing had in the matter, the court gave further direction that Norcross should appear and produce the books, papers and records before the grand jury at a session to be held on the next day, September 4th. This or-

der of September 3rd was served on Norcross but he refused to comply with its terms, stubbornly holding to the position that under no subpoena, and under no order of court would he comply with the direction that he produce the books, papers and documents of the Western Fuel Company for the inspection of the grand jury.

Under this branch of our discussion, the court will bear in mind that we are considering only the question of practice arising on the claim of counsel that the court was without jurisdiction for the reasons:

1. That the subpoena recited neither a specific charge nor a specific defendant; and
2. That no specific charge was actually under investigation by the grand jury.

The larger question of unlawful search or seizure in contemplation of the fourth amendment is reserved for the next subdivision of our argument.

We insist that as to the reasonableness of the time allowed for production of the books and papers, the pendency of an investigation, the materiality of the documents mentioned in the subpoena in the investigation found by the court to be in progress, the district court was acting within the unquestioned scope of its jurisdiction and this appellate tribunal should not review or disturb the action of that court in the premises.

**REASONABLENESS OF TIME ALLOWED FOR PRODUCTION OF
DOCUMENTS.**

The entire record will warrant our claim that the time allowed for the production of the books and papers was not a substantial or real reason for the refusal of Norcross or the Western Fuel Company to produce the books called for by the subpoena. At all events, the question of the reasonableness of time could not affect the jurisdiction of the District Court.

In this connection we ask attention to a few of the expressions made by the justices in the case of

Hale v. Henkel, 201. U. S.

At page 70 Mr. Justice Brown in the main opinion says:

“The second branch of the case relates to the non-production by the witness of the books and papers called for by the subpoena *duces tecum*. The witness put his refusal on the ground, first, that it was impossible for him to collect them within the time allowed; second, because he was advised by counsel that under the circumstances he was under no obligation to produce them; and finally, because they might tend to incriminate him.

“Had the witness relied solely upon the first ground, doubtless the court would have given him the necessary time.”

At page 78, Mr. Justice Harlan says:

“It may be, I am inclined to think as a matter of *procedure and practice*,” (italics ours) “that the subpoena *duces tecum* was too broad and indefinite. But the action of the

court in that regard was, at the utmost, only error, and that error did not affect its jurisdiction to make the order, nor authorize the witness—whose personal rights, let it be observed, were in no wise involved in the pending inquiry—to refuse compliance with the subpoena, upon the ground that it involved an unreasonable search and seizure of the books, papers and records of the corporation whose conduct, so far as it related to the Sherman Anti-Trust Act, was the subject of examination. It was not his privilege to stand between the corporation and the Government in the investigation before the grand jury.”

At pages 79-80, Mr. Justice McKenna said:

“If there was a violation of the Anti-Trust Act, that is, combinations in restraint of trade, it would be probably evidenced by formal agreements, but it might also be evidenced, or its transactions alluded to in telegrams and letters, *sent during the time the combination operated. Each telegram, each letter, would contribute proof and therefore material testimony.* Why then should they not be produced? What answer is given? It is said the subpoena is tantamount to requiring all the books, papers and documents found in the office of the MacAndrews & Forbes Company, and an embarrassment is conjectured as a result of its business. These, then, I assume, are the detrimental consequences that will be produced by obedience to the subpoena. *If such consequences could be granted, they are not fatal to the subpoena.* But they may be denied. There can be at most but a temporary use of the books, and *this can be accommodated to the convenience of parties. It is a matter for the court, and we cannot assume that the court would fail of consideration for*

the interest of parties or subject them to more inconvenience than the demands of justice may require.

“I cannot think that the consequences mentioned are important or necessary to the argument.”

The real insistence of these contemnors was essentially that at no time and in response to no subpoena or order of court would Norcross, the secretary or the Western Fuel Company allow the books or records of the corporation to be produced before the grand jury while the *third parties* the eight named defendants charged with conspiracy insisted on their non-production.

NEITHER THE BROAD TERMS OF THE SUBPOENA NOR THE ALLEGED IMMATERIALITY OF THE DOCUMENTARY EVIDENCE REFERRED TO IN THE SUBPOENA, AFFORDED A GROUND FOR ATTACKING THE JURISDICTION OF THE DISTRICT COURT IN GIVING ITS JUDGMENT FOR CONTEMPT.

In the case of *Hale v. Henkel* (201 U. S. 77), Mr. Justice Brown intimated that in his judgment the subpoena there served was too broad in its terms. Nevertheless after referring to the broad terms of the subpoena he concluded the opinion in this language:

“But this objection to the subpoena does not go to the validity of the order remanding the petitioner, which is therefore affirmed.”

Mr. Justice McKenna in the case of

Nelson v. U. S., 201 U. S. 114-115,

thus refers to the question of materiality:

(p. 114) "*The claim of immateriality of the testimony cannot avail plaintiffs against the orders of the circuit court.*"

After referring to the powers exercised by an examiner in taking testimony and noting exceptions, the justice continues:

"And an application to a court to compel delivery of testimony in aid of the examiner does not change the rule. The testimony is taken to be submitted to the court where the suit is pending and *all questions upon the evidence, its materiality and sufficiency are to be determined by it and after it, by an appellate court.* * * *

"These writs of error are not prosecuted by the parties in the original suit but *by witnesses to review a judgment of contempt against them for disobeying the orders to testify. Being witnesses merely, it is not open to them to make objections to the testimony. The tendency or effect of the testimony on the issues between the parties is no concern of theirs. The basis of their privilege is different from that and entirely personal.*"

See also in this connection,

Alexander v. U. S., 201 U. S. 117-122.

A more recent case dealing with this question is

Consolidated Rendering Co. v. Vermont, 207 U. S. 541-556; 52 L. Ed. 327-337.

In that case Mr. Justice Peckham, after referring to the broad terms of the notice calling for the

production of papers, thus speaks to this same question:

“The company refused to produce the books (with the exceptions stated) and even *if the notice had been too broad, the objection cannot be urged as to the validity of the order adjudging the company guilty of contempt. Hale v. Henkel*, 201 U. S. 43; 50 L. Ed. 652; 26 Sup. Ct. Rep. 370. But unless it can be said that a court or grand jury never has any right to call for the books and papers or correspondence between certain dates and certain persons named, in regard to a complaint which is pending before such court or grand jury, we think the objection here made is not well founded. *We see no reason why all such books, papers and correspondence which related to the subject of inquiry and were described with reasonable detail should not be called for and the company directed to produce them.* Otherwise the state would be compelled to designate each particular paper which is desired, which pre-supposes an accurate knowledge of such papers, which, the tribunal desiring the papers, would probably rarely, if ever, have.”

A still more recent case is

Wheeler v. U. S., 33 Sup. Ct. Rep. 158-161.

At page 161 Mr. Justice Day says:

“The proposition that the orders of the court of commitment and imprisonment deprived defendants of their liberty without due process of law seems to be based upon the contention that the corporation was in no way obliged to obey the subpoena, and that, after its dissolution, it was not subject to any subpoena requiring the production of books and papers before the

grand jury. But we do not think there is any merit in this objection. If the government had the legal right to demand the production of the books and papers in question, with a view to the investigation of the alleged offense of Wheeler and Shaw in the proceedings before the grand jury, *whether the subpoena was drawn in proper form or not*, or whether the corporation, in view of its dissolution, could have been compelled to comply with its requirements, *in the attitude which the case has taken, is immaterial*. It is apparent from the facts already recited that Wheeler and Shaw were required by the subpoena *duces tecum* to bring before the grand jury the books and papers of the corporation which had been dissolved, and that *they so understood the subpoena*; that they were in possession of such books and papers which could be by them produced before the grand jury, and that, *before the order of commitment was made, the defendants were allowed a full hearing in a court of competent jurisdiction.*"

These recent adjudications by the Supreme Court of the United States fully justify our contention that neither unreasonableness, nor lack of definiteness in the terms of the subpoena, nor broadness of the terms used in describing the documents required, nor the materiality of the evidence sought, can be availed of as a ground to dispute the jurisdiction of the District Court in passing upon these questions, and in making its judgment of contempt. If each of the varying elements of weakness suggested were found by this court to exist, nevertheless should this court take the same course as that

followed by Mr. Justice Brown in the Hale case, namely to affirm the judgment of the lower court.

A case frequently cited on the subject of the definiteness required in a subpoena *duces tecum* is

United States v. Babcock, Case No. 14484,
Vol. 24, Fed. Cas., pp. 908-9.

There Circuit Judge Dillon thus expressed himself:

“The only other objection made was that the petition and writ do not sufficiently identify the messages, or show them to be in the possession of the company, and that the writ, in fact, requires the company to make search for these messages. We think that the objection is not made with a proper view of the statements of petition in that regard, and of the functions of the writ. It is very easy, if Mr. Orton or the company is not in possession of the papers, for them to come here and say, ‘We have no such papers.’ That excuses them to the court, if the court is satisfied that such is the fact. But some degree of certainty is undoubtedly required in undertaking to specify the papers, and we have looked through books which have been referred to by counsel and others, and we find the law and practice quite well settled. It is this: *The papers are required to be stated or specified only with that degree of certainty which is practicable, considering all the circumstances of the case, so that the witness may be able to know what is wanted of him, and to have the papers on the trial, so that they can be used, if the court shall then determine that they are competent and relevant evidence.*

* * * * *

“Here are dispatches which are alleged to be in the possession of the telegraph company,

which is no party to the suit, and to be material in order to inquire into the legal rights of the parties, and the writ would be just as available for the defendant, as for the United States, if he required the messages. The writ describes, with sufficient particularity, in deed, with *all the particularity that seemed to be practicable* under the circumstances, the very messages that are wanted. *Vasse v. Mifflin* (Case No. 16,895)."

As indicated by Judge Dillon in the case last cited, it has frequently been held that the subpoena *duces tecum* sufficiently discharges its function when it *advises the witness* exactly what books and papers were meant. It is nowhere suggested in this record that either Norcross or the Western Fuel Company did not know what books, papers and records were required by the subpoenas here challenged.

Judge Gresham, in

U. S. v. Distillery No. 28, Case No. 14966,
25 Fed. Cas. 869,

thus speaks on the subject of the sufficiency of a description in a subpoena *duces tecum*:

"The description of the books and papers in the written motion and the order of the court is substantially: Certain day books, journals, cash books, ledgers, blotter books, blotters, invoices, dray tickets, etc., kept, received and taken by the claimants in their business as distillers, rectifiers and wholesale liquor dealers between certain dates named and since the 23rd day of June, 1874, showing the amount of spirits produced, received, removed and sold by them dur-

ing the time named. The claimants were *sufficiently advised by this description what books and papers were meant*. No greater certainty of description was required to satisfy the statute. *U. S. v. Three Tons of Coal* (Case No. 16515), *Myer v. Becker*, Id. 1208."

It would unduly extend this argument to set out in detail the descriptions contained in the various writs of subpoena *duces tecum*, for disobedience to which, judgments for contempt have been imposed—and subsequently sustained by appellate tribunals. In many of them the descriptions of the documents sought were quite as broad as in the subpoenas here under attack. We content ourselves in this regard by calling attention to a few of the cases and indicating the page of the report where the description in the particular case is set out.

Nelson v. U. S., 201 U. S. 99-100;

In re-Consolidated Rendering Co., 66 Atl. 792; (80 Vt. 55).

This is the case in which the judgment of the Supreme Court of the State of Vermont was affirmed by the United States Supreme Court in the decision from which we have above quoted (207 U. S. 554).

U. S. v. Three Tons of Coal, 3 Biss. 379;

Fed. Cas. 16516; Vol. 24; p. 158, column 2;

Wilson v. U. S., 221 U. S. 367;

Wheeler v. U. S., 33 Sup. Ct. Rep. 159, Col. 2;

In re-Storror, 63 Fed. 567 (decision by Judge Morrow);

United States v. American Tobacco Co., 146 Fed. 557;

Santa Fe Pacific Ry. Co. v. Davidson, 149 Fed. 604 (decision by Judge Ross);

Hammond Packing Co. v. Arkansas, 212 U. S. 332-354; 53 L. ed. 530.

IV.

THE COMPULSORY PRODUCTION OF THE DOCUMENTS MENTIONED IN THE SUBPOENA DUCES TECUM WOULD NOT CONSTITUTE UNREASONABLE SEARCH IN VIOLATION OF THE FOURTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

At the outset we again call attention to the fact that no violation of the fifth amendment to the Constitution as to immunity from self-incrimination is here presented. Neither Norcross, nor the Western Fuel Company urges any claim of that character. Both alike, take the position that the controversy, so far as they are concerned, is one between third parties—the Government of the United States on the one hand and the eight named defendants charged with conspiracy, and possibly other alleged fellow conspirators on the other. Counsel rely largely on the cases of *Boyd v. U. S.*, 116 U. S. 616-641 and *Hale v. Henkel*, 201 U. S. 43. The *Boyd* case, neither in its facts nor

in the principles enunciated in the opinion of the court, justifies counsel in his attack on the judgment for contempt, shown by this record. The Boyd case was not that of a corporation or one of its officers refusing, as against the Government, to permit the production of evidence shown by the corporate records or documents. The Boyd case involved the construction and constitutionality of section 5 of the Revenue Act of June 22, 1874. That act required the defendant, on motion of the Government attorney, to produce in court his private books, invoices and papers, failing which, the allegations of the Government attorney were to be taken as confessed. The court took the view that the statute was unconstitutional because it compelled the production of private papers of an individual *under penalty of forfeiture of his property*. The present case presents no question of threatened forfeiture of property by either contemnor.

The Boyd case surely does not warrant a reversal by this court from the judgment of contempt rendered by the District Court. The main question involved in the Boyd case is set out by Mr. Knight in the language of Mr. Justice Bradley, at pages 60-1 of his argument in this language:

“The principal question, however, remains to be considered. Is a search and seizure, or, what is equivalent, thereto, *a compulsory production of a man's private papers*, to be used in evidence against him in a proceeding to for-

feit his property for alleged fraud against the revenue laws—is such a proceeding for such a purpose an ‘*unreasonable search and seizure*’ within the meaning of the fourth amendment of the Constitution? Or is it a legitimate proceeding?”

The Boyd case was urged upon the attention of the Supreme Court of the United States in connection with the refusal to produce documents required by an order of the Interstate Commerce Commission in the case entitled

Interstate Commerce Commission v. Baird,
194 U. S. 25-47.

Mr. Justice Day, in the opinion in that case said:

“The origin and interpretation of the 4th Amendment to the Constitution, securing immunity from unreasonable searches and seizures, was fully discussed by Mr. Justice Bradley in the leading case of *Boyd v. United States*, 116 U. S. 616, 26 L. ed. 746, 6 Sup. Ct. Rep. 524. In that opinion the learned Justice points out the analogy between the 4th and 5th Amendments, and the object of both *to protect a citizen from compulsory testimony against himself which may result in his punishment or the forfeiture of his estate, or the seizure of his papers by force, or their compulsory production by process for the like purpose*. In the course of the opinion it is said: ‘Breaking into a house and opening boxes and drawers are circumstances of aggravation; but any forcible and compulsory extortion of a man’s own testimony or of his private papers *to be used as evidence to convict him of crime or to forfeit his goods* is within the condemnation of that judgment. In this regard the 4th

and 5th Amendments run almost into each other.

* * * * *

“As we have seen, the statute protects the witness from such use of the testimony given as will result in his *punishment for crime or the forfeiture of his estate*. Testimony given under such circumstances presents scarcely a suggestion of an unreasonable search or seizure.”

In the case at bar there is no possible question of unlawful seizure, nor is there any question of the forfeiture of estate. At page 870 the justice continues:

“Nor can we see force in the suggestion that these contracts were made with persons not parties to the proceeding. Undoubtedly the courts should protect nonlitigants from unnecessary exposure of their business affairs and papers. But it certainly can be no valid objection to the admission of testimony, otherwise relevant and competent, that a third person is interested in it.”

The Boyd case was again urged on the attention of the United States Supreme Court in *Hale v. Henkel*. Mr. Justice Brown in the opinion of the court, thus refers to that case:

“While the second ground does not set forth with technical accuracy the real reason for declining to produce them, the witness could not be expected to speak with legal exactness, and we think is entitled to assert that the subpoena was an infringement upon the Fourth Amendment to the Constitution, which declares that ‘the right of the people to be secure in their

persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.'

"The construction of this amendment was exhaustively considered in the case of *Boyd v. United States*, 116 U. S. 616, which was an information in rem against certain cases of plate glass, alleged to have been imported in fraud of the revenue acts.

* * * * *

"The history of this provision of the Constitution and its connection with the former practice of general warrants, or writs of assistance, was given at great length, and the conclusion reached that *the compulsory extortion of a man's own testimony, or of his private papers, to connect him with a crime or a forfeiture of his goods, is illegal, 'is compelling him to be a witness against himself, within the meaning of the Fifth Amendment to the Constitution, and is the equivalent of a search and seizure—and an unreasonable search and seizure—with-in the Fourth Amendment.'*

"Subsequent cases treat the Fourth and Fifth Amendments as quite distinct, having different histories, and performing separate functions. Thus in the case of *Interstate Commerce Commission v. Brimson*, 154 U. S. 447, the constitutionality of the Interstate Commerce Act, so far as it authorized the Circuit Court to use their processes in aid of inquiries before the Commission, was sustained, the court observing in that connection:

"It was clearly competent for Congress, to that end, to invest the Commission with authority to require the attendance and testimony of

witnesses, and the production of books, papers, tariffs, contracts, agreements and documents relating to any matter legally committed to that body for investigation. We do not understand that any of these propositions are disputed in this case.'

"The case of *Adams v. New York*, 192 U. S. 585, which was a writ of error to the Supreme Court of the State of New York, involving the seizure of certain gambling paraphernalia, was treated as involving the construction of the Fourth and Fifth Amendments to the Federal Constitution. It was held, in substance, that the fact that papers pertinent to the issue may have been illegally taken from the possession of the party against whom they are offered, was not a valid objection to their admissibility; that the admission as evidence in a criminal trial of papers found in the execution of a valid search warrant prior to the indictment, was not an infringement of the Fifth Amendment, and that by the introduction of such evidence, defendant was not compelled to incriminate himself. The substance of the opinion is contained in the following paragraph. It was contended that 'If a search warrant is issued, for stolen property and burglars' tools be discovered and seized, they are to be excluded from testimony by force of these Amendments. We think they were never intended to have that effect, but are rather designed to protect against *compulsory testimony from a defendant against himself in a criminal trial*, and to punish wrongful invasion of the home of the citizen or the unwarranted seizure of his papers and property, and to render invalid legislation or judicial procedure having such effect."

"The *Boyd* case must also be read in connection with the still later case of *Interstate Com-*

merce Commission v. Baird, 194 U. S. 25, which arose upon the petition of the Commission for orders requiring the testimony of witnesses and the production of certain books, papers and documents. The case grew out of a complaint against certain railway companies that they charged unreasonable and unjust rates for the transportation of anthracite coal. Objection was made to the production of certain contracts between these companies upon the ground that it would compel the witnesses to furnish evidence against themselves in violation of the Fifth Amendment, and would also subject the parties to unreasonable searches and seizures. It was held that the Circuit Court erred in holding the contracts to be irrelevant, and in refusing to order their production as evidence by the witnesses who were parties to the appeal. In delivering the opinion of the court, the Boyd case was again considered in connection with the Fourth and Fifth Amendments, and the remark made by Mr. Justice Day that the immunity statute of 1893 '*protects the witness from such use of the testimony given as will result in his punishment for crime or the forfeiture of his estate.*'

"Having already held that by reason of the immunity act of 1903, the witness could not avail himself of the Fifth Amendment, it follows that he cannot set up that Amendment as against the production of the books and papers, since in respect to these he would also be protected by the immunity act. *We think it quite clear that the search and seizure clause of the Fourth Amendment was not intended to interfere with the power of courts to compel, through a subpoena duces tecum, the production, upon a trial in court, of documentary evidence.* As remarked in Summers v. Moseley, 2 Cr. & M. 477, it would be 'utterly impossible

to carry on the administration of justice' without this writ. The following authorities are conclusive upon this question: *Amey v. Long*, 9 East. 473; *Bull v. Loveland*, 10 Pick. 9; *U. S. Express Co. v. Henderson*, 69 Iowa, 40; *Greenleaf on Evidence*, 469a.

"If, whenever an officer or employe of a corporation were summoned before a grand jury as a witness he could refuse to produce the books and documents of such corporation, upon the ground that they would incriminate the corporation itself, it would result in the failure of a large number of cases where the illegal combination was determinable only upon the examination of such papers. Conceding that the witness was an officer of the corporation under investigation, and that he was entitled to assert the rights of the corporation with respect to the production of its books and papers, we are of the opinion that there is a *clear distinction in this particular between an individual and a corporation, and that the latter has no right to refuse to submit its books and papers for an examination at the suit of the State.*"

The justice discusses the distinction between a private citizen and a corporation, a creature of the State, and then continues:

"Upon the other hand, the corporation is a creature of the State. It is presumed to be incorporated for the benefit of the public. It receives certain special privileges and franchises, and holds them subject to the laws of the State and the limitations of its charter. Its powers are limited by law. It can make no contract not authorized by its charter. Its rights to act as a corporation are only preserved to it so long as it obeys the laws of its creation. There is a reserved right in the legislature

to investigate its contracts and find out whether it has exceeded its powers. It would be a strange anomaly to hold that a State, having chartered a corporation to make use of certain franchises, could not in the exercise of its sovereignty inquire how those franchises had been employed, and whether they had been abused, and demand the production of the corporate books and papers for that purpose. The defense amounts to this: That an officer of a corporation, which is charged with a criminal violation of the statute, may plead the criminality of such corporation as a refusal to produce its books. To state this proposition is to answer it. *While an individual may lawfully refuse to answer incriminating questions unless protected by an immunity statute, it does not follow that a corporation, vested with special privileges and franchises, may refuse to show its hand when charged with an abuse of such privileges."*

The Boyd case and the Hale case were both cited in support of refusal to produce books and documents in

Consolidated Rendering Co. v. Vermont, 207
U. S. 541-556.

The objection urged there to the production of the books and papers was "that the statute and notice authorized an unreasonable search and seizure of the private books and documents of the company." In disposing of this contention, the court said:

(52 L. Ed. 335) "Sixth: The objection that the notice authorized by the statute amounted to an unreasonable search and seizure

of the private books and documents of the company is also not well founded. In *Adams v. New York*, 192 U. S. 585, 48 L. ed. 575, 24 Sup. Ct. Rep. 372, where the question was raised, the court refused to discuss the contention that the 14th Amendment made the provisions of the 4th and 5th Amendments to the Constitution of the United States, so far as they related to the right of the people to be secure against unreasonable searches and seizures, and to be protected against being compelled to testify in a criminal case against themselves, privileges and immunities of citizens of the United States of which they could not be deprived by the action of the state, because, on an examination of the record, the court concluded that there had been no violation of this restriction, either in the unreasonable search and seizure, or in compelling plaintiff in error to testify against himself."

The *Boyd* and *Hale* cases were again suggested to the Supreme Court by a witness refusing to produce corporate books and papers, in the case of

Wilson v. U. S., 221 U. S. 361.

In discussing the question of the efficacy of the fourth amendment to prevent the production of corporate books and papers, Mr. Justice Hughes, speaking for the court, said:

(p. 375) "*Nor was the process invalid under the 4th Amendment. The rule laid down in the case of Boyd v. United States*, 116 U. S. 616, 29 L. Ed. 746, 6 Sup. Ct. Rep. 524, *is not applicable here.* In that case, an information for the forfeiture of goods under the customs act of June 22, 1874, (18 Stat. at L. 186, chap.

39) U. S. Comp. Stat. 1901, p. 2018), it was held that the enforced production 'of the private books and papers' of the owner of the goods sought to be forfeited, under the provisions of section 5 of that act, was '*compelling him to be a witness against himself within the meaning of the 5th Amendment*', and was also '*the equivalent of a search and seizure—and an unreasonable search and seizure—within the meaning of the 4th Amendment.*' But there is no unreasonable search and seizure when a writ, suitably specific and properly limited in its scope, calls for the production of documents which, as against their lawful owner to whom the writ is directed, the party procuring its issuance is entitled to have produced.

* * * * *

"A command to the corporation is in effect a command to those who are officially responsible for the conduct of its affairs. If they, apprised of the writ directed to the corporation, prevent compliance or fail to take appropriate action within their power for the performance of the corporate duty, they, no less than the corporation itself, are guilty of disobedience, and may be punished for contempt.

* * * * *

(377) "For there can be no question of the character of the books here called for. They were described in the subpoena as the books of the corporation, and it was the books so defined which, admitting possession, he withheld.

* * * * *

(379) "We come, then, to the broader contention of the appellant,—thus stated in the argument of his counsel: 'An officer of a corporation who actually holds the physical possession, custody, and control of books or papers of the corporation, which he is required by a subpoena *duces tecum* to produce, is entitled

to the same protection against exposing the contents thereof which would tend to incriminate him, as if the books and papers were absolutely his own.' That is, the power of the courts to require their production depends not upon their character as corporate books and the duty of the corporation to submit them to examination, but upon the particular custody in which they may be found. If they are in the actual custody of an officer whose criminal conduct they would disclose, then, as this argument would have it, his possession must be deemed inviolable, and, maintaining the absolute control which alone will insure protection from their being used against him in a criminal proceeding, he may defy the authority of the corporation whose officer or fiduciary he is, and assert against the visitatorial power of the state, and the authority of the government in enforcing its laws, an impassable barrier.

(380) "But the physical custody of incriminating documents does not of itself protect the custodian against their compulsory production. The question still remains with respect to the nature of the documents and the capacity in which they are held. It may yet appear that they are of a character which subjects them to the scrutiny demanded and that the custodian has voluntarily assumed a duty which overrules his claim of privilege. This was clearly implied in the *Boyd Case*, where the fact that the papers involved were the private papers of the claimant was constantly emphasized. Thus, in the case of public records and official documents, made or kept in the administration of public office, the fact of actual possession or of lawful custody would not justify the officer in resisting inspection, even though the record was made by himself and would supply the evidence of his criminal de-

reliction. If he has embezzled the public moneys and falsified the public accounts he cannot seal his official records and withhold them from the prosecuting authorities on a plea of constitutional privilege against self-crimination. The principle applies not only to public documents in public offices, but also to records required by law to be kept in order that there may be suitable information of transactions which are the appropriate subjects of governmental regulation, and the enforcement of restrictions validly established. *There the privilege which exists as to private papers cannot be maintained.*

* * * * *

(382) "The fundamental ground of decision in this class of cases is that where, by virtue of their character and the rules of law applicable to them, the books and papers are held subject to examination by the demanding authority, the *custodian has no privilege to refuse production although their contents tend to criminate him. In assuming their custody he has accepted the incident obligation to permit inspection.*

"What, then, is the status of the books and papers of a corporation which has not been created as a mere instrumentality of government, but has been formed pursuant to voluntary agreement, and hence is called a private corporation? They are not public records in the sense that they relate to public transactions, or, in the absence of particular requirements, are open to general inspection, or must be kept filed in a special manner. They have reference to business transacted for the benefit of the group of individuals whose association has the advantage of corporate organization. * * * But the corporate form of business activity, with its chartered privileges,

raises the distinction when the authority of government demands the examination of books. *That demand, expressed in lawful process, confining its requirements within the limit which reason imposes in the circumstances of the case, the corporation has no privilege to refuse. It cannot resist production upon the grounds of self-crimination.* Although the object of inquiry may be to detect the abuses it has committed, to discover its violations of law, and to inflict punishment by forfeiture of franchises, or otherwise, it must submit its books and papers to duly constituted authority when demand is suitably made. This is involved in the reservation of the visitatorial power of the state, and in the authority of the national government where the corporate activities are in the domain, subject to the powers of Congress.

“This view, and the reasons which support it, have so recently been stated by this court in the case of Hale v. Henkel, supra, that it is unnecessary to do more than to refer to what was there said.

* * * * *

(384-5) “The appellant held the corporate books subject to the corporate duty. If the corporation were guilty of misconduct, he could not withhold its books to save it; and if he were implicated in the violations of the law, he could not withhold the books, to protect himself from the effect of their disclosures. The reserved power of visitation would seriously be embarrassed, if not wholly defeated in its effective exercise, if guilty officers could refuse inspection of the records and papers of the corporation. No personal privilege to which they are entitled requires such a conclusion. It would not be a recognition, but an unjustifiable extension, of the personal rights they enjoy. They may decline to utter upon the wit-

ness stand a single self-criminating word. They may demand that any accusation against them individually be established without the aid of their oral testimony or the compulsory production by them of their private papers. *But the visitatorial power which exists with respect to the corporation of necessity reaches the corporate books without regard to the conduct of the custodian.*

“Nor is it an answer to say that in the present case the inquiry before the grand jury was not directed against the corporation itself. The appellant had no greater right to withhold the books by reason of the fact that the corporation was not charged with criminal abuses. That, if the corporation had been so charged, he would have been compelled to submit the books to inspection despite the consequences to himself, sufficiently shows the absence of any basis for a claim on his part of personal privilege as to them; it could not depend upon the question whether or not another was accused. The only question was whether, as against the corporation, the books were lawfully required in the administration of justice.”

See also in this connection

Dreier v. U. S., 221 U. S. 394,

in which case also the recalcitrant corporation officer, urged in extenuation of his failure to produce documents, the case of *Boyd v. U. S.*, so strongly relied upon in the case at bar, by Mr. Knight.

A still more recent case involving the duty of a corporate official to produce corporate records, was decided by the Supreme Court of the United States

on January 6th of the present year, the case being entitled

Wheeler v. United States, 33 Sup. Ct. Rep.
158-162.

There, as in the case at bar, the corporate official urged that compliance with the subpoena *duces tecum* would constitute an unreasonable search under the fourth amendment to the Constitution of the United States. Mr. Justice Day, in disposing of this contention said:

(p. 162) "We are of the opinion that this case is virtually ruled by *Wilson v. United States*, supra. In that case it was held that there was no unreasonable search or seizure where the officer of a corporation, whose guilt of an offense against the laws of the United States was under investigation, was compelled to produce books and papers of the corporation of which he was president, because, as against the corporation, the true owner of the books and papers, their production might lawfully be compelled, and that there was no self-incrimination of such officer, because he was not compelled to produce his private books, but *the books of the corporation which were not within the protection given to the private books and papers of an individual*. We are unable to see that this case differs in principle from that one.

* * * * *

"But, as was held in the *Wilson* case, *the privilege of the Constitution against unreasonable searches and seizures does not protect against the lawful examination in due course of books of this character; nor does the privilege of individuals against self-incrimination in the production of their own books and papers prevent the compulsory production of the books of a corporation with which they happen to be*

or have been associated. It was the character of the books and papers as corporate records and documents which justified the court in ordering their production, as this court ruled in the Wilson case."

See also in this connection

Bornn Hat Co. v. U. S., 184 Fed. 506;

affirmed by the United States Supreme Court in 32 Sup. Ct. Rep. 521.

Hammond Packing Co. v. Arkansas, 212 U. S. 332; 53 L. Ed. 530.

Baltimore & O. Ry. v. Int. Com. Commission, 221 U. S. 612-622;

Santa Fe Pac. Ry. v. Davidson, 149 Fed. 603;

American Banana Co. v. United Fruit Co., 153 Fed. 943;

Grant v. United States, 33 Sup. Ct. Rep. 190.

IV.

THE DOCUMENTS DESCRIBED IN THE SUBPOENA DUCES TECUM SERVED ON NORCROSS AND THE WESTERN FUEL COMPANY AND WHICH JUDGE DOOLING ORDERED TO BE PRODUCED BEFORE THE GRAND JURY, WERE IN FACT ESSENTIALLY MATERIAL EVIDENCE FOR THE CONSIDERATION OF THE GRAND JURY IN THE INVESTIGATION OF THE FRAUDS CHARGED IN THE THREE INDICTMENTS AS AGAINST THE DEFENDANTS NAMED AND AS AGAINST THEIR FELLOW CONSPIRATORS, POSSIBLE DEFENDANTS IN FUTURE INDICTMENTS.

At page 67 of the printed argument, Mr. Knight states this proposition: "There is no proper found-

ation for the contempt proceedings relative to the character of the evidence sought to be produced.” The opening sentence under this heading is in this language: “Our last objection to the action of the learned court below adjudging appellant guilty of contempt is that it nowhere appears that he refused to give material or relevant evidence, or to produce documents which were material or relevant to any pending matter.” The question here presented is in substance the same as that discussed by us in subdivision I of this argument.

Of course we make no claim that either a subpoena *duces tecum*, or any other process of court, may be maliciously or wantonly used for the purpose of unlawfully annoying a party or witness for the mere pleasure of a fishing excursion for United States attorneys or the Government whom they represent. Grand juries and courts are not established for the encouragement of mere sport or wantonness as such. It certainly is not the conceived function or purpose of the officers of this court who present this argument to harass unduly fellow citizens of the United States whose conduct has been subjected to governmental investigation. While for the time being they are Government officials they are still officers of this court under obligation to make no improper use of its process. In subdivision I of our argument we demonstrated that a subpoena *duces tecum* requiring the production of papers by a witness before a grand jury may be issued as of course. The authority for such issuance

is the general Section 716, R. S. The requirements of Section 724 and Section 869 as to the preliminary application to the court and the requisite showing before the court will grant the application, had no bearing on the matter of the issuance as of course a subpoena *duces tecum* which is warranted by Section 716. No preliminary showing of materiality of testimony sought, is required. In passing on the question of contempt, the tribunal adjudging the contempt may, if the point be made, pass on the *fact of materiality* of the documentary evidence sought. The *fact of materiality*, not the matter of preliminary showing, especially where none is required, is the determining factor in this regard in the establishment of the contempt. No question can be predicated on the face of this record as to the immateriality of the documentary evidence mentioned in the subpoenas *duces tecum*, served on these contemnors. Neither Norcross, nor the Western Fuel Company, ever claimed that the evidence here sought was not material in an investigation of the conspiracy to defraud the Government charged in the three indictments shown by the record, as against the eight named defendants and their unnamed fellow conspirators.

Norcross and the corporation both attest, by their conduct, the absolute materiality of the documentary evidence described in the subpoena and directed by Judge Dooling to be produced.

In this connection we ask attention to the following language in the affidavit of Norcross, shown at page 78 of the record:

“Three sets of indictments have been returned against them and these indictments charge a continuing conspiracy from 1904 to June 1913.

“The trial of these indictments is set for Tuesday August 26th 1913 in this court. For several weeks past the attorneys have been requiring me to make up tables, compilations, summaries and statements from these books and *certain of these tables, statements and compilations are still uncompleted and these books are being made use of every day in the preparation of the defense of its officers and directors.* I am informed by the attorneys, and I believe, and I therefore state, that *they will continue to require the use of these books up to the time of trial which is only eight days from to-day.*”

If the books covered by the subpoena and by the order of Judge Dooling were absolutely essential for the defense of the eight alleged conspirators, they must have been material to the matter involved in the indictments mentioned and in possible further indictments against the same parties or others. If material in connection with the parties already indicted, they would be likewise material in the investigation of charges against the unnamed fellow conspirators of the indicted officers and employees of the Western Fuel Company.

Of the *fact of materiality of the testimony sought*, there can not be any serious question on the face of this record. Especially should this court incline to our view of this matter when the record shows that *no claim of immateriality was made at any stage of the proceedings either before the grand*

jury or before Judge Dooling, when he afforded both of these contemnors a full opportunity to be heard before he made his final order directing the production of the documents mentioned in the subpoenas *duces tecum*.

The fact of materiality is not here in question.

The several cases cited by Mr. Knight at pages 68 to 76 of his argument, deal with the proposition that a witness should not be punished for contempt if it appear that the testimony sought to be elicited from him under compulsory process was not material to the determination of any issue presented, or any subject matter under legitimate investigation. Counsel devotes several pages to an extended quotation from *Ex parte Clarke*, 126 Cal. 235. The release of a prisoner on habeas corpus in that case was based on the *fact* that the evidence which the court sought to compel him to produce was not material to the cause of the party who sought its production.

At page 240, Mr. Justice McFarland says:

“There was no showing by affidavit or otherwise that the books in question contained any evidence material to plaintiff’s cause; the only evidence on the point was the testimony of petitioner when on the witness stand as plaintiff’s own witness, and *that showed that they did not contain such evidence.*”

The record here before the court shows through its every page the fact that the evidence here sought is material in the determination of the question

whether or not the defendants named in the three indictments and their fellow conspirators were guilty of fraud in connection with the weights of coal cargoes received and portions thereof subsequently delivered to other ships, as mentioned in the indictments. If material as to the eight named defendants, they were material likewise in the investigation of the frauds on the part of other alleged conspirators.

We again invite attention to the case of

U. S. v. Babcock, 3 Dill. 566; Case No. 1484;
24 Fed. Cas. 909.

Judge Dillon there said:

“But Mr. Shepley suggested, in argument, that there was no sufficient showing here that these papers were material. * * * It is to be observed that the district attorney does state that these papers are material evidence in the case, but, *whether they are material or not, is a question which cannot be determined in advance—that depends upon the actual posture and situation of the case when they come to be offered*; and when the district attorney asserts that they are material papers, we must assume, for the present, that he is fully informed, and that they are material.”

In considering a similar question, Judge Lacombe, in

Edison Electric L. Co. v. U. S. Electric L. Co.,
44 Fed. 296,

said:

“This argument deals, of course, with the materiality of the proposed evidence when pro-

duced, and to this motion, which is practically directed to securing its presence in court, the complainant objects that the evidence, if produced, would be immaterial. That question, however, should not be determined upon application to produce the papers. The court should pass upon it with the proposed evidence before it, so that it may act intelligently, and that an exception to its refusal to admit the testimony, should it so refuse, may be of avail to the exceptant upon appeal. *If the only objection to admitting these documents in evidence be that they are immaterial, that objection is of no avail in opposition to an application which calls for their production.* Without therefore finally determining the question as to the materiality of these documents, it is sufficient to say that, in view of the contract relations between Edison and the company, and of the rule of law as to the admissibility of a party's admissions, and in view of the effect accorded to such admissions in the case cited by defendant (*Giant Powder Co. v. California etc. Co.*, 4 Fed. Rep. 720), and, finally, in view of the contents of the documents as disclosed by the moving papers, there is not found in the objection as to the materiality of the evidence sufficient to warrant the refusal of the officers of the corporation to obey the subpoena *duces tecum*, and to produce the documents, which are concededly in the hands of its counsel, subject to its orders and under its control."

In this connection we again ask the court to bear in mind that counsel for contemnors insist that the very evidence here sought, had at one time been placed by the corporate officials in the hands of the federal officials and that a wrongful advantage had been taken of such action by the Government

in having the indictments found, which are set out in the record. If on such foundation, indictments already had could be found by jurors presumably discharging their oath-bound duty, possibly other indictments based on the same foundation might be found against the unnamed fellow conspirators. In any event, the documentary evidence was, as it must have been, material in the investigation of the frauds charged in the three indictments as against the named defendants and other unnamed fellow conspirators.

We again ask attention to the case of

Nelson v. U. S., 201 U. S. 92.

At page 111, Mr. Justice McKenna, speaking for the court says:

“Plaintiffs in error urge three main contentions, which we will consider in their order.

“I. That the evidence, documentary and oral, which the witnesses were required to produce, was not shown to be material to plaintiff’s case.

“1. There are three answers to this contention. (1) The evidence is clearly material. The charge of the bill is that the defendant manufacturing corporations entered into a conspiracy and combination in violation of the act of July 2, 1890, to suppress competition between themselves, and that they accomplished this purpose by organizing the General Paper Company, and gave it certain controlling powers over the output of the mills and the prices and distribution of their products.

“Before the application to the court for the orders under review there were certain facts established.”

After showing the relevancy of the matters called for by the subpoena, to the pending investigation, Mr. Justice McKenna continues at page 112:

“At any rate, the manner in which the paper company executed its functions may be links in the evidence adduced by the United States, and this is enough to establish the materiality of the evidence.”

At page 114 the learned Justice continues:

*“The claim of immateriality of the testimony cannot avail plaintiffs against the orders of the Circuit Court. * * **

“The testimony is taken to be submitted to the court where the suit is pending and all questions upon the evidence, its materiality and sufficiency, are to be determined by it and after it by an appellate court.

* * * * *

“These writs of error are not prosecuted by the parties in the original suit, but by witnesses, to review a judgment of contempt against them for disobeying orders to testify. *Being witnesses merely, it is not open to them to make objections to the testimony. The tendency or effect of the testimony on the issues between the parties is no concern of theirs. The basis of their privilege is different from that and entirely personal.*”

SUMMARY.

On the facts disclosed by this record and the law bearing thereon, as established by the federal statutes and the adjudications of the courts of the United States, we are convinced that the judgment of District Judge Dooling cannot be successfully attacked for lack of that jurisdiction which makes a con-

tempt judgment final. The identical evidentiary matters covered by the subpoenas and by the final order to produce, made by Judge Dooling, served as the basis of the three indictments set out in this record. These identical papers might properly be relied on by the Government as *material* evidence in further investigation as to possible criminal conduct by fellow conspirators of the parties already indicted, including Government employees and officials of vessels in the import trade, as well as those on out-going vessels of American register.

Under the general powers of courts of the United States exercising criminal jurisdiction and necessarily inherent common law functions, subpoenas *duces tecum* are issuable as of course out of the office of the clerk of the court in whose aid a federal grand jury acts in the administration of the criminal law. Such grand jury exercises inquisitorial powers, acting on matters originating on the initiative of the jurors themselves, or otherwise. To the rightful exercise of its inquisitorial jurisdiction, no preliminary charge is essential. Without known defendant or specific pending charge, its duty is to inquire without offense or public warning to one under investigation who may be absolutely innocent of criminal conduct, whether, within the territorial jurisdiction of the court, a crime or public wrong has been committed, and without fear or favor, present its honest finding to the appropriate court. The successful exercise of its functions demands the secrecy of investigation en-

joined by the official oath administered when entering upon its duty. Men innocent of even apparent wrongdoing should not by public process be unnecessarily presented to public observation as persons already victims of a formal charge of crime.

Malefactors, reeking with guilt, should not, by formal forewarning of impending investigation, be afforded timely suggestion and open avenue of escape. Neither a defendant named in anticipation of a charge, nor a charge as yet unestablished, is an essential ingredient of a valid subpoena requiring from a witness either personal attendance and oral evidence, or production of evidentiary documents. Witnesses or written instruments alike may be coerced into the service of the state without compelling in advance, judicial determination of the absolute relevancy or materiality of the testimony conscientiously sought by sworn and impartial public investigators. The law indulges the presumption of faithful discharge of public duty. A witness, whether a party to a pending controversy or not, may not judicially determine for himself, as against the Government process, the relevancy or materiality of the evidence sought from him or through him. If likely to subject himself to criminal charge or prosecution by his spoken word, or production of his private written instruments, he may well say to whomsoever attempts to coerce him, that the spirit of the English and American law gives him the sanctuary of secrecy and immunity against self-immolation on the altar of public sacrifice.

The corporate creation of the state, however, may not arrogate to itself or its official representative the immunity which our institutions give only to the natural private non-corporate citizen.

We reiterate, no original application for subpoena *duces tecum*, nor action by the District Court thereon was requisite to the lawful issuance and enforcement of the writ. No specific charge stated in the writ nor culprit named therein was essential to its validity as process from the District Court. No antecedent scheme or purpose of investigation on the part of the grand jury was requisite to the validity of the process or the proper exercise of inquisitorial powers by that body. The absolutely established *factual materiality of the evidentiary instruments* covered by the subpoenas and by Judge Dooling's order is manifest on every page of the record here before the court. Such materiality was nowhere questioned either by Norcross or by the Western Fuel Company, before the grand jury, or before Judge Dooling. Judge Dooling's judgment was within the unquestioned jurisdiction of his court. It was warranted by the facts and the law. It should be neither questioned nor disturbed by this appellate tribunal.

Dated, San Francisco,
November 22, 1913.

Respectfully submitted,

MATT I. SULLIVAN,

THEO. J. ROCHE,

*Assistants to the Attorney General
of the United States.*

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

DAVID C. NORCROSS,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

No. 2329

In the Matter of the Application of
David C. Norcross for Writ of Habeas
Corpus.

DAVID C. NORCROSS,

Plaintiff in Error,

vs.

UNITED STATES OF AMERICA,

Defendant in Error.

No. 2328

WESTERN FUEL COMPANY

(a corporation),

Plaintiff in Error,

vs.

UNITED STATES OF AMERICA,

Defendant in Error.

No. 2327

PETITION FOR A REHEARING.

*To the Honorable William B. Gilbert, Presiding Judge,
and the Associate Judges of the United States
Circuit Court of Appeals for the Ninth Circuit:*

Appellant and plaintiffs in error hereby respectfully petition for a rehearing of these cases and assign the following grounds therefor:

The objections raised by us to the subpoena *duces tecum* in question were all summarily overruled, without discussion, on the authority of three cases whose dissimilarity from the cases at bar we endeavored to show on the argument, and to these cases a brief reference will be hereafter made.

On the day the record in these cases was filed, counsel for the Government urged haste in having them heard during the past term, and, after the argument, asked for a speedy decision because of the trial which was about to take place in the District Court, for which the books, papers and documents called for were wanted by the prosecution; and we cannot but feel, with all due respect to the court, that the lack of time which the court felt was at its disposal precluded that consideration of these cases which they would have received had they taken their normal course.

The prime importance of the principal questions here involved, regardless of the parties now affected by the decision, impels us to again, although briefly, urge the court to re-examine our position in view of the acknowledged facts of the case and in the light of prior pertinent adjudications, thereby preventing the

creation of a precedent, at least in this circuit, fraught with the gravest consequences in the administration of the criminal law, where constitutional methods may be lost sight of in the zeal of the prosecutor. The decision will be comparatively unimportant as far as the custody of these books and papers are concerned, for all of them are being deposited, by agreement, with the clerk of the trial court and there made accessible to the Government for such use as may be properly made of them; and there remains merely the fine of \$2000 imposed upon the Western Fuel Company. The importance of the decision, however, lies in the effect it will have upon the practice of the federal criminal law in this circuit.

If this decision is allowed to stand, then it follows that, on the eve of trial of parties charged with the commission of an offense against the federal laws, a United States grand jury, at a prosecutor's instance, can virtually ransack the office of a company under whose "guise and name" the defendants are charged with having entered into a criminal conspiracy, and obtain the production of every writing, book, paper and record registering its countless business transactions amounting to two dray loads in quantity and extending over the entire life of over ten years of such corporation, merely for the purpose of obtaining evidence in that case, and not for the purpose of presenting fresh charges against anyone, or of correcting those already made. In view of the virtually uncontradicted facts of these cases, the court,

by its decision, thus sanctions the perversion of the functions of the grand jury and its use in aid of the Government in the preparation of the prosecution of a pending criminal trial. We respectfully insist that, from the record in these cases, the decision of this court can mean nothing else.

The party objecting to this procedure is not a defendant about to be tried, and is not based upon the plea of self-crimination, but is the company itself, a third party to the main controversy, which owns and was in possession of the papers sought to be obtained.

We again briefly ask the court's attention to the two principal objections raised by us to the subpoena under consideration, the other points being largely matters of practice which were only adverted to upon the argument as showing in these particular cases a failure to follow a procedure sanctioned by the highest authority; and in considering these two objections we ask the court to bear in mind that if any doubt can arise respecting our constitutional rights in the premises, we are entitled to invoke the rule laid down in

Boyd v. U. S., 116 U. S. 616; 29 L. Ed. 746,

that constitutional provisions for the security of persons and property must be liberally construed in favor of those thus seeking protection.

1. THERE MUST BE A PROCEEDING OR INVESTIGATION OF SOME KIND PENDING BEFORE THE GRAND JURY HAVING, FOR ITS OBJECT, THE FINDING (OR IGNORING, AS THE CASE MAY BE) OF A PRESENTMENT OR INDICTMENT AGAINST SOME KNOWN OR UNKNOWN PERSON, AS A PRE-REQUISITE TO THE RIGHT OF THE GRAND JURY TO TAKE EVIDENCE. THE GRAND JURY CANNOT BE USED MERELY TO COLLECT EVIDENCE FOR USE OF THE PROSECUTOR IN A PENDING CRIMINAL CASE.

We venture to say that no report of any case can be found in any jurisdiction, either American or English, which upholds the right of the Government to utilize the grand jury for the sole purpose of obtaining information in the prosecution of a criminal case, such as was attempted here; nor can any authority be found which, dealing with this particular subject, has not, directly or inferentially, held that there must be some investigation against known or unknown parties by a federal grand jury in order to enable the Government to compel the production of oral or documentary evidence before that body. The inquiry may be of wide scope or it may be comparatively restricted. It may be against known parties or parties whose names or whose connection with an alleged offense are unknown, but there must be an inquiry of that character.

The record shows here affirmatively that there was no such inquiry. After appellant and plaintiff in error had been called before the grand jury two or three times the object of the proceeding became apparent to him and then he sought the advice of counsel. Documentary information relative to the case of *United States v.*

Howard et al., was wanted, and nothing else; and when this information was not immediately forthcoming, *the trial of that case was repeatedly postponed in the District Court, and by reason of the pendency of that trial at an early date*, the Government's counsel sought and obtained consideration of these cases by this court in advance of their due course. If the subpoena *duces tecum* had nothing to do with that pending trial, these cases would not have been heard in their regular course until the next February term.

This court in observing that

“the subpoena did not contain the usual *ad testificandum* clause”

did not perhaps grasp the force of our objection in this respect. We do not claim that the failure of the subpoena to call upon the witness to testify nullifies its command to produce the documentary evidence. It is abundantly established that a subpoena *duces tecum* may require a witness to produce documents without calling upon him to testify. The omission in the subpoena to call on the witness to testify, therefore, is immaterial; but our point in this respect is that *it did not refer to any proceeding pending before the grand jury, or to any charge, specific or otherwise, against any person, known or unknown*; and our contention is that the absence of a legitimate proceeding before the grand jury, as shown by the evidence, and illustrated by the subpoena, makes any commitment based thereon void. If the court will read the subpoena issued in the *Wilson* case found in the mar-

ginal notes thereof (55 L. Ed. 774), it will be observed that it did refer to a proceeding pending before the grand jury; and in its opinion the Supreme Court refers to that proceeding. This point was there decided merely by a reference to *Hale v. Henkel*, *post*. The *Wheeler* and the *Shaw* cases, also cited by this court to sustain its general conclusion, do not touch the subject. The point was not adjudicated because the record in each of those cases (which were heard together and involved the same parties) shows that the grand jury had a matter under investigation, to wit: the alleged criminality of Wheeler and Shaw, as officers of the Wheeler and Shaw Company, when it called for the books of the latter.

The only remaining recent case on the subject,

Hale v. Henkel, 201 U. S. 43; 50 L. Ed. 652,

directly affirmed in the *Wilson* case, holds, in effect, that a grand jury must have under consideration some action against somebody in order to entitle it to take evidence. It may not know just what criminal offense, if any, this evidence, when completed, may establish; it may not know what persons may be implicated; *but in order to enable it to take action, it must be contemplating some other result than furnishing the district attorney with ammunition for use in a trial about to be heard.*

In that case there was a matter pending before the grand jury of which it could take cognizance; and in delivering the court's opinion, Mr. Justice Brown,

quoting with approval a former eminent member of that court, said, with reference to grand juries:

"They are not appointed for the prosecutor or for the court, they are appointed for the Government and for the people." (Italics ours.)

In the cases before the court there was no indictment laid before the grand jury, and can the court say that the latter body was proceeding with the view to a presentment? Mr. Justice Brown, adopting Blackstone's definition of a presentment said:

"A presentment, properly speaking, is the notice taken by a grand jury of any offense from their own knowledge or observation, without any bill of indictment laid before them, at the suit of the king, as the presentment of a nuisance, a libel, and the like; upon which the officer of the court must afterwards frame an indictment, before the party presented can be put to answer. * * *

A presentment may be based, not only upon their [grand juries'] own personal knowledge, but from the examination of witnesses."

It is impossible to read ~~that~~^{this} decision without reaching the conclusion that in order to enable it to receive evidence, there must be some matter pending before the grand jury of which it can properly take cognizance; and in that case there was a proceeding of that kind so pending.

That eminent New York criminal jurist, Judge Goff, said in a much cited case,

In re Morse, 87 N. Y. Supp. 727,
that

"The grand jury being an adjunct of the court is considered a part thereof, and *that grand juries*

"cannot institute a new and independent inquiry for the purpose of eliciting additional testimony to supplement or strengthen the testimony on which the indictment was found, or to aid the prosecutor in the trial of the case." (Italics ours.)

This court, by its present decision, is flatly deciding to the contrary.

Now, if the subpoena in this case had conformed to the practice and correctly set out the fact, the witness would have been thereby apprised that he was called upon to produce documentary evidence before the grand jury in a case pending in the U. S. District Court entitled "*United States v. John L. Howard et al.*"

We say the facts are undisputed. The opinion in this case recites that

"there is no substantial dispute as to the facts; indeed, most of the facts are expressly agreed to."

The attempt of the learned counsel for the Government in their brief to make it appear that there is a finding in the record as to the pendency of a legitimate investigation before the grand jury, is not supported by the record. The grand jury's presentment (record, p. 26), presumably prepared by counsel although signed by the foreman, does state that appellant was sworn to

"testify as a witness in an investigation then being pursued by said grand jury concerning certain frauds alleged to have been perpetrated and committed by said Western Fuel Company against the United States;"

(as to which, we may parenthetically remark, indictments had been found and the jury's duty in this respect was *functus officio*).

See

In re Morse, supra.

And it is true that in the judgment of the learned court below (record, p. 20) it is stated that appellant was sworn to

“testify as a witness in an investigation then being pursued by said grand jury concerning certain frauds alleged to have been perpetrated against the United States,”

which clause, omitting the name of the alleged offender, closely follows the language of the presentment; but, of course, the judgment is only effective when founded on facts established by the record, and the presentment or complaint, so to speak, falls if not supported by the evidence. Now, the foreman of the grand jury (record, pp. 97-101) denied that there was any such proceeding pending before the grand jury despite the language of his presentment, and special counsel for the Government admitted (record, pp. 80-81, 88-89, 90-93) that there was no such proceeding pending when the books and papers were demanded; and, furthermore, when we sought to bring out this fact they *denied that the showing was material* (record, p. 90), counsel taking the same position there as here, that it made no difference whether or not there was anything pending before the grand jury, or what their purpose was in calling for the company's records.

We respectfully submit that the conclusion reached by this court on the subject is at variance with all recognized authority, state and federal, and imposes on a grand jury duties wholly foreign to the spirit and genius of our institutions.

2. THE SUBPOENA WAS UNREASONABLE AND VIOLATIVE OF THE 4TH AMENDMENT TO THE U. S. CONSTITUTION.

Each of the three cases on which this court relied in reaching its decision is based upon the proposition that a person charged with the commission of crime cannot invoke the 5th amendment and plead self-crimination as an excuse for refusing to produce books of a corporation in his possession or under his control. We again expressly disavow self-crimination as a defense, but this court seems to have so inseparably connected the 4th and 5th amendments to the federal Constitution as to make a violation of one depend upon a violation of the other, and inability to plead one follow inability to plead the other. Self-crimination sought to be obtained by process contrary to the 5th amendment may also make that process invalid under the 4th amendment as constituting an unreasonable search or seizure. *Process, however, directed to a corporation or an officer thereof may constitute an unreasonable search or seizure without involving the element of self-crimination.* This is illustrated in the case of

Hale v. Henkel, supra,

where the court said that cases subsequent to the *Boyd* case

“treat the 4th and 5th amendments as quite distinct having different histories, and performing separate functions,”

citing several authorities to support its conclusions.

“ * * * We do not wish to be understood as holding that a corporation is not entitled to immunity, under the 4th amendment, against unreasonable searches and seizures.” * * * “We are also of opinion that an order for the production of books and papers may constitute an unreasonable search and seizure within the 4th amendment.”

Said the court further with respect to the subpoena then under consideration:

“Applying the test of reasonableness to the present case, we think the subpoena *duces tecum* is far too sweeping in its terms to be regarded as reasonable. It does not require the production of a single contract, or of contracts with a particular corporation, or a limited number of documents, but all understandings, contracts, or correspondence between the MacAndrews & Forbes Company, and no less than six different companies, as well as all reports made and accounts rendered by such companies from the date of the organization of the MacAndrews & Forbes Company, as well as all letters received by that company since its organization from more than a dozen different companies, situated in seven different states in the Union.

“If the writ had required the production of all the books, papers, and documents found in the office of the MacAndrews & Forbes Company, it would scarcely be more universal in its operation or more completely put a stop to the business of that company. Indeed, it is difficult to say how its business could be carried on after it had been denuded of this mass of material, which is not

shown to be necessary in the prosecution of this case, and is clearly in violation of the general principle of law with regard to the particularity required in the description of documents necessary to a search warrant or subpoena. [Italics ours.]

Doubtless many, if not all, of these documents may ultimately be required, but some necessity should be shown, either from an examination of the witnesses orally, or from the known transactions of these companies with the other companies implicated, or some evidence of their materiality produced, to justify an order for the production of such a mass of papers. A general subpoena of this description is equally indefensible as a search warrant would be if couched in similar terms. *Ex parte Brown*, 72 Mo. 83, 37 Am. Rep. 426; *Shaftsbury v. Arrowsmith*, 4 Ves. Jr. 66; *Lee v. Angas*, L. R. 2. Eq. 59."

This last paragraph is applicable *in haec verba* to the cases now before the court, substituting the name of Western Fuel Company for that of MacAndrews & Forbes Company.

In the *Wilson* case the subpoena merely called for the production of letter press copy books of a corporation containing copies of letters and telegrams covering only a period of two months, May and June, 1909.

In the *Wheeler* and *Shaw* cases, apparently heard together, the subpoena merely called for the books of account and copies of letters and telegrams extending over a period of fifteen months. The point of the decision in the *Wilson* case is that a person charged with crime who had in his possession the books of a corporation, of which he was president, could not thwart the efforts of the directors of that corporation

by refusing to produce these records, on the ground that their production would lead to self-crimination; and the point in the *Wheeler* and *Shaw* cases is that persons whose acts were under investigation by the grand jury could not, under the plea of self-crimination, refuse to produce, under a subpoena *duces tecum*, books and papers then owned by them but formerly belonging to a corporation which had become dissolved, the court holding that these records, having once been impressed with a corporate character, did not lose it by passing into private ownership.

On the question of the unreasonableness of the subpoena the records in the cases of

Hale v. Henkel, and

In re American Sugar Refining Company, supra, are far more closely analogous to the record in the cases under consideration than the records in the cases relied upon by this court, as their examination will disclose. There is a vast difference between a demand, on the one hand, which calls for correspondence covering only a period of two months (*vide* the *Wilson* case) or a demand covering books of account and correspondence covering a period of fifteen months (*vide* the *Wheeler* and *Shaw* cases), both of which were held reasonable, and, on the other hand, a demand, which was held unreasonable, for all agreements and correspondence between a certain company and six other firms or corporations associated with it from the date of the organization of that company, reports and accounts rendered by these associated interests to the principal company, correspondence be-

tween the latter since the date of its organization with thirteen other companies connected with it, and contracts with the principal company and four other tobacco companies (*vide* the *Henkel* case), or a demand, also held unreasonable, for the papers specifically mentioned in a certain subpoena *duces tecum* consisting entirely of contracts, communications and correspondence between certain named parties (*vide* the *American Sugar Refining Co.* case), or, finally, the demand, as in this case, for all books, papers, records and vouchers of Western Fuel Company showing its entire coal business in detail for over ten years, the length of its whole corporate life, and all weekly, monthly and yearly financial and other reports made to the directors of that company, and its minute books of stockholders' and directors' meetings during that period, and all stock ledgers, stock journals, stock certificate books showing the various shareholders of that company for the same period, as well as all ledgers, cash books and papers showing the financial conduct of its business during the same period, which, according to the uncontradicted evidence of the company's secretary, included

“the production of all the books the company has. To produce them would involve a suspension of the company's business. They are so numerous that it would take two express wagons to carry them out to the grand jury room (record, p. 78).”

And this demand was made less than two weeks before the date of a trial *which was postponed because the demand was not complied with.* The *Wilson*,

Wheeler and *Shaw* cases do not compare with the *Henkel* and *American Sugar Refining Company* cases as authorities upon the reasonableness of the subpoena in question.

As we said at the time of the argument, appellant is under a subpoena *duces tecum* to produce these books and papers at the time of the trial in the District Court. We have not raised any question as to that subpoena, because we are in a position to protect ourselves upon the trial. Furthermore, a legitimate investigation has now been instituted before the grand jury and new subpoenas have been issued, correcting the defects complained of in the subpoena under consideration. These are being obeyed.

We are not contesting the subpoena now under consideration captiously, or merely for the purpose of gaining time. No purpose can be subserved thereby. The court knows that we willingly joined in expediting the hearing of these cases in this court. The books and papers are, moreover, as we have already said, now being placed in *custodia legis*, taken there in installments, so as not to produce a suspension of the business of plaintiff in error Western Fuel Company by denuding it of every record and paper that it has.

If the judgment of the learned court below is affirmed, the conclusion drawn thereby from the facts of these cases becomes so harsh and so drastic, that the court may well pause before sanctioning it; and we,

therefore, earnestly ask for a reconsideration of the decision herein.

Respectfully submitted,

SAMUEL KNIGHT,

STANLEY MOORE,

*Attorneys for Appellant, Plaintiffs in
Error and Petitioners.*

CERTIFICATE OF COUNSEL.

I hereby certify that I am of counsel in the foregoing cases; that in my judgment the petition herein is well founded and is not interposed for delay.

2 Dec/13

SAMUEL KNIGHT,

*Of Counsel for Appellant, Plaintiffs in
Error and Petitioners.*

IN THE
United States Circuit Court of Appeals

For the Ninth Circuit.

DAVID C. NORCROSS,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee. } No. 2329

In the Matter of the Application of
David C. Norcross for Writ of
Habeas Corpus.

DAVID C. NORCROSS,

Plaintiff in Error,

vs.

UNITED STATES OF AMERICA,

Defendant in Error. } No. 2328

WESTERN FUEL COMPANY

(a corporation),

Plaintiff in Error,

vs.

UNITED STATES OF AMERICA,

Defendant in Error. } No. 2327

**Memorandum in Reply to Petition of Appellant and
Plaintiffs in Error for a Rehearing After Decision,
Filed Herein November 20, 1913.**

The undersigned, assistants to the Attorney
General of the United States, respectfully submit

the following memorandum for consideration of the court, in connection with the petition for rehearing heretofore filed herein by attorneys for appellant and plaintiffs in error.

When the above entitled matters were reached on the calendar, Mr. Samuel Knight, one of the attorneys for appellant and plaintiffs in error, at the conclusion of his oral argument asked leave to file a printed copy of the same, and such printed copy was subsequently filed. The undersigned attorneys for the government were also permitted to file a printed reply to the argument of Mr. Knight. In advance of the filing of such brief by the attorneys for the government, this honorable court on November 20, 1913, filed its decision and opinion under and by which the judgment of the District Court was affirmed. The printed brief in reply to the argument of Mr. Knight, was subsequently filed on the 22nd day of November, 1913. That brief was prepared with some elaboration, and contains on the page facing the title page an index to the statement of the facts and law argument and references to the various pages of the document, in which the several matters of fact and law are discussed. In addition, it contains on preceding pages a list of authorities cited or referred to by counsel on either side of the controversy. It is respectfully requested that if need be, in determining the action of the court on the petition for rehearing heretofore filed, the brief above referred to, together with the authorities therein cited, may be taken into consideration by the court.

The main reliance of counsel for appellant and

plaintiffs in error on the oral argument of counsel and in the petition for rehearing is based on two decisions of the United States Supreme Court, namely, *Boyd v. U. S.*, 116 U. S. 616; 29 L. Ed. 246; and *Hale v. Henkel*, 201 U. S. 43; 50 L. Ed. 652.

At pages 64 to 80 of our printed brief on file herein, we discuss the proposition that

“The compulsory production of the documents mentioned in the subpoena *duces tecum* would not constitute an unreasonable search in violation of the fourth amendment to the Constitution of the United States.”

The *Boyd* case, as we there contended, concerned the *compulsory production of a man's private papers* in aid of an effort by the Government *to secure a forfeiture of his individual property*—not the production by an officer of the books or papers of the corporation under investigation by a grand jury.

The case of *Hale v. Henkel*, when analyzed, is found to be a distinct affirmative authority in favor of the position here taken by counsel for the Government. The court there affirmed the contempt judgment of the lower court. The ruling made by this court in the cases at bar is directly supported not only by *Hale v. Henkel* but by the cases cited in the opinion of Circuit Judge Ross, speaking for this court.

Dated, San Francisco,
December 4, 1913.

Respectfully submitted,

MATT I. SULLIVAN,

THEO. J. ROCHE,

*Assistants to the Attorney General
of the United States.*

United States
Circuit Court of Appeals
For the Ninth Circuit.

LEE LEONG,

Appellant,

vs.

THE UNITED STATES OF AMERICA,

Appellee.

In the Matter of the Petition of LEE LEONG for
a Writ of Habeas Corpus.

Transcript of Record.

Upon Appeal from the United States District Court for
the Territory of Hawaii.

FILED

DEC 4 - 1913

No. 2331

United States
Circuit Court of Appeals

For the Ninth Circuit.

LEE LEONG,

Appellant,

vs.

THE UNITED STATES OF AMERICA,

Appellee.

In the Matter of the Petition of LEE LEONG for
a Writ of Habeas Corpus.

Transcript of Record.

**Upon Appeal from the United States District Court for
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Names and Addresses of Attorneys.

For Petitioner, LEE LEONG:

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and

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For Respondent, RICHARD L. HALSEY, Esq.,
U. S. Immigration Inspector in Charge at
the Port of Honolulu:

ROBERT W. BRECKONS, Esq., United States
District Attorney, Honolulu, Hawaii. [1*]

*In the United States District Court for the Territory
of Hawaii.*

In the Matter of the Petition of LEE LEONG for
a Writ of Habeas Corpus.

**Order Extending Time [to October 25, 1913] to
Procure and File Record on Appeal.**

Good cause appearing therefor, IT IS HEREBY
ORDERED that Lee Leong, appellant herein, may
have to and including the 25th day of October, 1913,
within which to procure from the clerk of the United
States District Court for the Territory of Hawaii, to
be filed in the United States Circuit Court of Appeals
for the Ninth Circuit, the record on appeal in said
cause as required by the praecipe filed herein.

Dated Honolulu, T. H., October 7, 1913.

CHAS. F. CLEMONS,
Judge, United States District Court, Territory of
Hawaii.

*Page-number appearing at foot of page of original certified Record.

[Endorsed]: No. 57. (Title of Court and Cause.)
Order Extending Time to Procure and File Record on
Appeal. Filed October 7, 1913. A. E. Murphy,
Clerk. By (Sgd.) F. L. Davis, Deputy Clerk. [2]

*In the United States District Court for the Territory
of Hawaii.*

In the Matter of the Petition of LEE LEONG for a
Writ of Habeas Corpus.

**Order Extending Time [to October 15, 1913] to
Procure and File Record on Appeal.**

Good cause appearing therefor, IT IS HEREBY
ORDERED that Lee Leong, appellant herein, may
have to and including the 15th day of October, 1913,
within which to procure from the clerk of the United
States District Court for the Territory of Hawaii,
to be filed in the United States Circuit Court of Ap-
peals for the Ninth Circuit, the record on appeal in
said cause as required by the praecipe filed herein.

Dated Honolulu, T. H., September 13, 1913.

CHAS. F. CLEMONS,

Judge, United States District Court, Territory of
Hawaii.

[Endorsed]: No. 57. (Title of Court and Cause.)
Order Extending Time to Procure and File Record on
Appeal. Filed September 13, 1913. A. E. Murphy,
Clerk. By (Sgd.) F. L. Davis, Deputy Clerk. [3]

*In the District Court of the United States in and for
the District and Territory of Hawaii.*

In the Matter of the Petition of LEE LEONG for a
Writ of Habeas Corpus.

**Order Extending Time [to September 26, 1913] to
Complete Record on Appeal.**

On reading and filing the affidavits of Lorrin Andrews and O. P. Soares, and good cause appearing therefor, it is hereby

ORDERED that Lee Leong, appellant in the above-entitled cause, may have to and including the 26th day of September, 1913, within which to complete the record on appeal in said cause by filing the transcript of evidence, as required by the praecipe filed herein.

September 10, 1913.

CHAS. F. CLEMONS,

Judge of the United States District Court, District
of Hawaii. [4]

*In the District Court of the United States in and for
the District and Territory of Hawaii.*

In the Matter of the Petition of LEE LEONG for a
Writ of Habeas Corpus.

**Affidavit of Lorrin Andrews [in Support of Applica-
tion for Extension of Time to File Record on
Appeal].**

Territory of Hawaii,

City and County of Honolulu,—ss.

Lorrin Andrews, being duly sworn, deposes and

says: That he is a member of the firm of Andrews & Quarles, who, with George S. Curry, appeared as attorneys for the appellant in the above-entitled cause; that appellant duly filed his Petition on Appeal, Assignment of Errors and an Order Allowing Appeal and Citation of Appeal within two days after the judgment was pronounced in the above-entitled cause by the United States District Court for the District of Hawaii, and further paid all costs and filed a praecipe of papers required on said appeal with the Clerk of the United States court for the District of Hawaii; that thereafter, in view of the fact that said clerk was unable to prepare the record on appeal by the date required in said appeal, on the 15th day of July, 1913, by stipulation between the United States District Attorney, representing the respondent, and the attorneys representing the appellant, the time within which appellant was allowed to perfect said appeal was extended sixty days from the 15th day of July, 1913; that said time is about to expire, and, although the attorneys for appellant have used due diligence and have repeatedly requested a copy of the transcript of evidence in said [5] cause from the official stenographer, he has been unable to furnish them with the same before the 9th day of September 1913, and that as United States Circuit Court of Appeals for the Ninth Judicial Circuit, the Appellate Court herein, is in the city of San Francisco, State of California, it will be impossible to file said transcript with the other papers making up the record on appeal within the time set by the stipulation aforesaid; that deponent, therefore, asks a further extension of time

of ten days, to wit, on or before the 26th day of September, 1913, to obtain said transcript so that the same may be filed in the Circuit Court of Appeals in San Francisco.

LORRIN ANDREWS.

Subscribed and sworn to before me this 10th day of September, 1913.

[Seal]

WM. L. ROSA,

Deputy Clerk, United States District Court, Territory of Hawaii. [6]

In the District Court of the United States in and for the District and Territory of Hawaii.

In the Matter of the Petition of LEE LEONG for a Writ of Habeas Corpus.

Affidavit of O. P. Soares [in Support of Application for Extension of Time to File Record on Appeal].

Territory of Hawaii,
City and County of Honolulu,—ss.

O. P. Soares, being duly sworn, deposes and says: That he is the official stenographer of the United States Court for the District of Hawaii, and, as such stenographer, took the testimony in shorthand in the above-entitled cause; that shortly after the filing of the Notice of Appeal he was requested by the attorneys for the appellant to make up the transcript of said testimony in longhand for the purpose that the same could be used in the record on appeal; that he has been actually engaged since that time almost daily

in the taking of testimony in the United States District Court and has been unable to complete the transcript in said cause, and through great press of work he was unable to complete the same before Sept. 9, 1913; that the money due to him in said cause for making said transcript has been duly paid by the attorneys for the appellant.

O. P. SOARES.

Subscribed and sworn to before me this 9th day of September, 1913.

[Seal]

NOA W. ALULI,

Notary Public, First Judicial Circuit, Territory of Hawaii. [7]

[Endorsed]: No. 57. (Title of Court and Cause.) Order Extending Time to Complete the Record on Appeal. Affidavit of Lorrin Andrews. Affidavit of O. P. Soares. Filed Sep. 10, 1913. A. E. Murphy, Clerk. By (Sgd.) Wm. L. Rosa, Deputy Clerk. [8]

In the District Court of the United States in and for the District and Territory of Hawaii.

In the Matter of the Petition of LEE LEONG for a Writ of Habeas Corpus.

Order Extending Time [Sixty Days from July 16, 1913] for Appearance [in Appellate Court].

Good cause appearing therefor, it is hereby ordered that the time mentioned in the citation on appeal herein for appearance before the Circuit Court of Appeals for the Ninth Judicial Circuit of the United States be, and the same is hereby, extended for

SIXTY (60) days from the 16th day of July, A. D. 1913.

This order is based upon the stipulation filed herein.

S. B. DOLE,

Judge of the United States District Court, District and Territory of Hawaii.

Honolulu, Hawaii, July 16, 1913.

[Endorsed]: No. 57. (Title of Court and Cause.)
Order Extending Time. Filed Aug. 9, 1913. A. E. Murphy, Clerk. By (Sgd.) Wm. L. Rosa, Deputy Clerk. [9]

*In the District Court of the United States in and for
the District and Territory of Hawaii.*

In the Matter of the Petition of LEE LEONG for a
Writ of Habeas Corpus.

ON APPEAL TO THE CIRCUIT COURT OF
APPEALS FOR THE NINTH JUDICIAL
CIRCUIT OF THE UNITED STATES.

**Stipulation [for Extension of Time to Appear in
Appellate Court].**

It is hereby expressly stipulated and agreed by and between ANDREWS & QUARLES and GEO. S. CURRY, attorneys for the above-named LEE LEONG, appellant, and C. C. BITTING, Esquire, Assistant United States District Attorney, in and for the District and Territory of Hawaii, representing the United States, Appellee herein, that, based upon the record in the above-entitled cause, and on the affidavit of the clerk of the above-entitled court, the time,

mentioned in the citation on appeal herein for appearance before the Circuit Court of Appeals for the Ninth Judicial Circuit of the United States, be extended for SIXTY (60) days from the 16th day of July, A. D. 1913.

Honolulu, Hawaii, July 15, 1913.

ANDREWS & QUARLES,

GEO. S. CURRY,

Attorneys for Appellant.

C. C. BITTING,

Asst. U. S. District Attorney, District and Territory
of Hawaii. [10]

*In the District Court of the United States in and for
the District and Territory of Hawaii.*

In the Matter of the Petition of LEE LEONG for a
Writ of Habeas Corpus.

**Affidavit [of A. E. Murphy, in Support of Extension
of Time to File Record in Appellate Court].**

United States of America,

Territory of Hawaii,

City and County of Honolulu,—ss.

And now comes A. E. Murphy, and being first duly sworn upon his oath, according to law, deposes and says; that he is clerk of the District Court of the United States in and for the District and Territory of Hawaii; that the record in the above-entitled cause on appeal to the Circuit Court of Appeals in and for the Ninth Judicial Circuit will not be and cannot be prepared or filed in the Appellate Court on or before the 16th day of July, A. D. 1913, and considerable

further time will be required by affiant for the preparation of such record.

And further deponent saith not.

A. E. MURPHY.

Subscribed and sworn to before me this 16th day of July, A. D. 1913.

[Seal]

F. L. DAVIS,

Deputy Clerk United States District Court, Territory of Hawaii. [11]

[Endorsed]: No. 57. (Title of Court and Cause.) Stipulation and Affidavit. Filed Jul. 16, 1913. A. E. Murphy, Clerk. By (Sgd.) Wm. L. Rosa, Deputy Clerk. [12]

In the District Court of the United States in and for the District and Territory of Hawaii.

No. 57.

In the Matter of the Petition of LEE LEONG for a Writ of Habeas Corpus.

Statement [of Clerk U. S. District Court Showing Date of Commencement of Suit, etc.].

TIME OF COMMENCING SUIT:

May 16, 1913: Verified petition for writ of habeas corpus filed and writ issued to the United States Marshal for the District of Hawaii.

NAMES OF ORIGINAL PARTIES:

Petitioner: LEE LEONG.

Respondent: RICHARD L. HALSEY, Esq., U. S. Inspector of Immigration in charge at the Port of Honolulu.

DATES OF FILING OF THE PLEADINGS:

May 16, 1913: Petition.

May 22, 1913: Return of Richard L. Halsey.

May 26, 1913: Exceptions to Return and Motion to Discharge.

May 27, 1913: Motion to Strike Exceptions to Return.

June 5, 1913: Answer to Return.

SERVICE OF PROCESS:

May 16, 1913: Writ issued and delivered to the United States Marshal for the District of Hawaii. Said writ afterwards returned into court with the following return by the said United States Marshal: "The within Petition, Order and Writ of Habeas Corpus was received on the 16th day of May, A. D. 1913, and returned as executed this 17th day of May, A. D. 1913, by hand upon RICHARD L. HALSEY, U. [13] S. Immigration Inspector for the Port of Honolulu and C. C. BITTING, Asst. U. S. District Attorney, by exhibiting to each of them the original Petition, Order and Writ of Habeas Corpus and handing to and leaving with each of them a certified copy of same."

HEARINGS.

May 28, 1913: Hearing on Return to Writ.

The above hearing was had before the Honorable CHARLES F. CLEMONS, Judge of said court.

DECISIONS.

June 2, 1913: Decision denying writ and ordering Petitioner remanded to custody of Respondent.

June 14, 1913: Decision allowing and fixing bail pending appeal at \$2,000.00.

JUDGMENT.

June 14, 1913: Judgment filed and entered.

PETITION FOR APPEAL.

June 16, 1913: Petition for Appeal filed and order allowing same filed. [14]

United States of America,
District of Hawaii,—ss.

I, A. E. MURPHY, Clerk of the United States District Court for the District of Hawaii, do hereby certify the foregoing to be a full, true and correct statement showing the time of commencement of the above-entitled suit; the names of the original parties thereto; the several dates when the respective pleadings were filed; and account of the proceedings showing the service of the writ herein and the time when the judgment herein was rendered and the Judge rendering the same, in the matter of the Petition of Lee Leong for a Writ of Habeas Corpus, Number 57, in the United States District Court for the District of Hawaii.

IN WITNESS WHEREOF, I have hereunto set

my hand and affixed the seal of said District Court this 15th day of October, A. D. 1913.

[Seal]

A. E. MURPHY,

Clerk, United States District Court, District of
Hawaii. [15]

*In the District Court of the United States in and
for the District and Territory of Hawaii.*

In the Matter of the Petition of LEE LEONG, for
a Writ of Habeas Corpus.

Petition for a Writ of Habeas Corpus.

To the Honorable District Court of the United States
in and for the District and Territory of Hawaii,
and to the Honorable SANFORD B. DOLE,
Judge of Said Court.

The humble petition of Lee Leong, a citizen of the
United States of America, humbly represents and
shows unto this Honorable Court and unto your
Honor, and the petitioner alleges and charges as fol-
lows:

I.

That your petitioner was born at Waikiki, in the
City and County of Honolulu, on the Island of Oahu,
and Territory of Hawaii, on or about the 21st day
of January, A. D. 1888, and at the time of such birth
both of petitioner's parents were permanent residents
of and at said Waikiki; that his father's name was
Lee Sing, and his mother's name Lum Shee; that
after his birth your petitioner resided and lived with
his said parents at said Waikiki for a period of about
four years, after which your petitioner was taken

to China by his said parents, and there resided with his parents in Sun Chin village, China, up to and [16] until the time he left for Honolulu, in the City and County of Honolulu, Island of Oahu, Territory of Hawaii, in the United States of America, in or about the month of February, A. D. 1913, and arrived at the port of said Honolulu, on or about the 10th day of March, A. D. 1913, as a passenger on the American steamship "Siberia."

II.

That petitioner's father was a resident of Waikiki, in said Honolulu, at the time of petitioner's birth, and was lawfully married to Lum Shee, the mother of your petitioner. That petitioner's parents now reside in Sun Chin village in China.

III.

That on or about the 21st day of November, A. D. 1912, the Secretary of the Territory of Hawaii, after application and upon due and orderly hearing as provided by law, issued to and for this petitioner a certificate of Hawaiian birth, certifying that this petitioner was born in the Hawaiian Islands on or about the 21st day of January, A. D. 1888, which certificate was issued under the great seal of the Territory, and to which was attached a photograph of the person so certified to have been born in the Hawaiian Islands, and by which photograph this petitioner is fully identified.

IV.

That upon the arrival at the port of Honolulu aforesaid on or about the 10th day of March, A. D. 1913, this petitioner was taken in charge by the Im-

migration Officers of the United States, and afterwards conveyed to the United States Immigration Station where he is unjustly and without warrant or authority at law imprisoned and restrained of his liberty by Richard L. Halsey, Immigration Inspector in Charge, United States Immigration Service, [17] under the claim or pretense, as petitioner is informed and believes, and so upon such information and belief alleges, that he, the said petitioner, is a Chinese laborer, and as such not entitled to land in the United States.

That on or about the 14th day of March, A. D. 1913, the said petitioner was given the semblance of a hearing to determine whether the said petitioner should be allowed to land in said Honolulu or be sent back to China, by the Immigration officers of the United States; that said hearing was not a fair and *bona fide* hearing, but the proceedings were conducted in an illegal and improper manner, and not in accordance with the acts of the Congress of the United States in such case made and provided. That petitioner attaches to this petition a copy of the said proceedings had and taken before the Immigration Officers of the United States, which copy is marked Exhibit "A," and which petitioner prays may be made a part of this petition as fully to all intents and purposes as if fully set out herein in words and figures, and petitioner attaches to this petition a copy of the certificate of Hawaiian birth presented, marked Exhibit "B," and which petitioner prays may be made a part of this petition as fully to all intents and purposes as if fully set out

here in words and figures. That upon said semblance of a hearing such certificate of Hawaiian birth was presented by the petitioner to the Immigration Officers of the United States, and a large number of witnesses were examined by such officers, and testified that petitioner was born at Waikiki as aforesaid, and identified him. And petitioner further alleges that such proceedings were conducted in an illegal and improper manner and the Immigration Officers of the United States did not arrive at a conclusion nor make any findings based upon the testimony of such witnesses, and did not give proper weight, nor any weight, to the [18] certificate of Hawaiian birth presented, nor did the said Immigration Inspector in Charge base his conclusion on the evidence offered, nor did he give to such certificate the weight to which it is entitled by the laws of the United States in such case made and provided, but the said Inspector in Charge, in spite of the evidence offered, and in spite of the certificate presented as aforesaid, denied petitioner admission and ordered him deported to China, in excess of his jurisdiction, and without giving to the petitioner a fair and impartial hearing.

And the said Inspector in Charge examined several additional witnesses on or about the 1st day of April, A. D. 1913; that such witnesses testified fully, clearly and concisely that petitioner was born at Waikiki as aforesaid, and fully identified him, but the said Inspector in Charge, without giving such further evidence any consideration, dismissed it with the remark

“I see no reason to change the opinion already formed.”

And the several questions propounded to the petitioner and the numerous witnesses by the Immigration Officers of the United States show that the said officers were biased and prejudiced, and their sole purpose was not to give a fair hearing, but that the said several questions so propounded were propounded with the definite purpose and view to mislead, confuse and raise doubt as to the undoubted right of this petitioner to land in said Honolulu, and there was an utter disregard of the rights of the petitioner thereby and by reason thereof, and the said Inspector in Charge without evidence, and without the semblance of a right and without authority of law, denied this petitioner a landing at said Honolulu, but acted arbitrarily, contrary to and in violation of the evidence heard by him, contrary to law and the rights of this petitioner, and denied petitioner the right [19] and benefit of his birth in Hawaii. Petitioner appealed from said decision to the Department of Commerce and Labor, which arbitrarily, contrary to law and said evidence, affirmed said decision.

V.

And your petitioner further shows that he is held in custody, detained, imprisoned and deprived of his liberty by said Richard L. Halsey, in violation of the Constitution of the United States, to wit: Article 14, Constitutional Amendments, and contrary to the Act of the Congress of the United States in such case made and provided, as petitioner is in-

formed and believes, and upon such information and belief alleges and avers, under and by virtue of the claim as aforesaid, and threatens to deport your petitioner to China at the earliest opportunity, and your petitioner further shows that said holding in custody, detention and imprisonment, and such threat to deport are illegal for the reasons hereinbefore set forth.

WHEREFORE, to be relieved of said unlawful detention and imprisonment, your petitioner prays that a writ of *habeas corpus*, to be directed to the said Richard L. Halsey, United States Immigration Inspector in Charge, as aforesaid, may issue in this behalf, so that your petitioner may be forthwith brought before this Honorable Court, to do, submit to and receive what the law may direct.

(Sgd.) LEE LEONG,
Said Petitioner.

Dated, Honolulu, Hawaii, May 16, 1913.

(Sgd.) GEO. S. CURRY,

(Sgd.) ANDREWS & QUARLES,

Attorneys for Petitioner. [20]

United States of America,
Territory of Hawaii,
City and County of Honolulu,—ss.

And now comes Lee Leong, who being first duly sworn, upon his oath, according to law, deposes and says: That he is the petitioner named in the above and foregoing petition for a writ of *habeas corpus* subscribed by him; that he has heard the same read over to him and knows the contents thereof, and that

the matters and things therein set forth and contained are just, true and correct, except as to those matters and things therein alleged on information and belief, and as to them he verily believes them to be true.

(Sgd.) LEE LEONG,
Petitioner.

Subscribed and sworn to before me, by the said Lee Leong, this 16th day of May, A. D. 1913.

[Seal] (Sgd.) P. H. BURNETTE,
Notary Public, First Judicial Circuit, Territory of
Hawaii. [21]

**Petitioner's Exhibit "A" [to Petition for Writ of
Habeas Corpus—Testimony Taken Before Im-
migration Inspector].**

Copy. Honolulu, T. H., March 14, 1913.
Case of LEE LEONG ex SS. "Siberia," 3/10/13.
Manifest No. HK. 3-6.

HARRY B. BROWN, Inspector.
TONG KAU, Interpreter.

Applicant presents Hawaiian Birth certificate No. 95A, dated Nov. 21, 1912.

[Testimony of Lee Leong.]

Applicant, sworn, testifies:

Q. What is your name?

A. Lee Leong—no others.

Q. Are you married? A. Yes.

Q. What is your married name?

A. Lee Ling Hoo.

Q. How old are you? A. 25.

Q. What is the date of your birth?

(Testimony of Lee Leong.)

A. Feb. 21, 1888.

Q. What is the Chinese date?

A. I don't remember the day and month. The year was K. S. 14 (1888).

Q. What is your occupation? A. Peddler.

Q. Do you desire an attorney and an interpreter present during the hearing of your case? A. No.

Q. Where have you been living in China?

A. Sun Chin.

Q. Are your parents living? A. Yes.

Q. What are the names of your father and his age?

A. Lee Sing and Lee Chuck Hing; aged 55.

Q. What is the name and age of your mother?

A. Lum Shee; aged 46.

Q. What kind of feet has she? A. Bound.

Q. How many brothers and sisters have you?

A. One sister only.

Q. What is the name and age of your sister?

A. Lee Moy; aged 23.

Q. Is she married? A. Yes.

Q. To who and where?

A. Mr. Wong, and Ban Mee Yuen village.

Q. How long has she been married?

A. 4 or 5 years.

Q. Has she any children? A. One daughter.

Q. How old is this daughter? A. 4 years.

Q. When were you married?

A. 4 years ago.

Q. Who was married first, you or your sister?

A. I was.

Q. What is the name of your wife?

(Testimony of Lee Leong.)

A. Lum She.

Q. How old is she? A. 21.

Q. What kind of feet has she? A. Bound.

Q. What village did your wife come from?

A. On Tong.

Q. How many children have you? A. One son.

Q. What is his name and age?

A. Lee Saukun; aged 3.

Q. Are your father's parents living? A. No.

Q. When did they die?

A. Long ago, more than 20 years.

Q. What were their names?

A. Lee On Sun, and mother was Wong She.

Q. What village did your mother come from?

A. On Tong.

Q. Are her parents living? A. No.

Q. How many brothers and sisters has your mother?

A. One. Brother Lum Kwai Sau; he is in On Tong village.

Q. How many brothers and sisters has your father?

A. None.

Q. Did he ever have any that died? A. No.

Q. What is your father's occupation?

A. Peddler.

Q. What is he peddling?

A. He is a storekeeper.

Q. What kind of a store has he?

A. General merchandise.

Q. What is the name of that store?

A. Ming Lee.

(Testimony of Lee Leong.)

Q. Where is the store? A. Sun Chin.

Q. How long has he had the store?

A. 4 or 5 years.

Q. What did your father do before that?

A. Before that he was a banana planter, in Honolulu.

Q. When your father went to China did he get a paper to return to Hawaii? A. No.

Q. When did he return to China from Hawaii?

A. 21 years ago. [22]

Q. You told me a little while ago that your father had had this store for 4 or 5 years. Now, you say that he returned to China 21 years ago. What did he do from the time he went to China until the store was started? A. Nothing to do.

Q. Are you sure that your father did nothing at all these years?

A. Sometimes he did farm work.

Q. Was your father sick or crippled in any manner? A. No.

Q. How long have you been a peddler?

A. 4 or 5 years; sometimes I was in my father's store, and sometimes I peddled.

Q. What did you peddle?

A. The goods from my father's store.

Q. Have you ever been in Hawaii before?

A. Yes, I was born here.

Q. Where were you born? A. Waikiki.

Q. How do you know that you were born at Waikiki? A. My mother told me so.

Q. When did you first learn that you were born

(Testimony of Lee Leong.)

here? A. When I was 12 or 13 years old.

Q. When did you go to China from *China*?

A. When I was 4 years old.

Q. Who took you to China? A. My parents.

Q. Did your father return to Hawaii after taking you to China? A. No.

Q. Do you know why your father took you to China and remained there?

A. He had saved money.

Q. Where was your sister born? A. Waikiki.

Q. When did she go to China?

A. When she was 2 years old.

Q. Who took her to China?

A. She went the same time I did.

Q. What boat did you go to China on?

A. I don't know.

Q. Did your mother ever tell you? A. No.

Q. Did you ever hear anyone else than your mother say that you were born in Hawaii?

A. No.

Q. Did you ever hear your father talk about his being in Hawaii? A. No.

Q. Then how do you know that your father was in Hawaii? A. My mother told me so.

Q. Since your father has had this store, has any of the people from Hawaii been to this store and talked with him?

A. Some came back from Hawaii, but they did not talk together.

Q. Did you ever hear your father talk to anyone about Hawaii or about his being here? A. No.

(Testimony of Lee Leong.)

Q. Did your mother ever talk to you more than once about your being born in Hawaii?

A. No; many times.

Q. Did she ever talk to you about it in the presence of your father? A. Yes.

Q. Did your father ever say anything about things in Hawaii? A. No.

Q. As I understand he just sat there and let your mother talk to you about your being born in Hawaii, and he never said a word? A. Yes.

Q. When did your mother tell you about Hawaii?

A. She just said I was born in Honolulu.

Q. You told me that you were born in Waikiki.

A. She said Waikiki.

Q. What reason did she have for telling you this so many times and not say anything else?

A. Sometimes we would sit together and she would tell me.

Q. Did you ever hear your mother talk to your father about the time they were in Hawaii?

A. I did not hear.

Q. Then, as I understand it, sometimes when you and your mother were sitting together she would say, "Ah Leong, you were born in Waikiki, Honolulu"?

A. Yes.

Q. Did you never ask her about your birthplace?

A. No.

Q. Why not—would you not like to know about your birthplace? A. I never asked.

Q. Did you never think, "I wonder what kind of a place I was born in"? A. No. [23]

(Testimony of Lee Leong.)

Q. Why are you coming here now?

A. I came to work.

Q. What kind of work? A. Anything.

Q. How do you know that there is work to be had here? A. My cousin told me so.

Q. Did your mother ever tell you that there was work to be had here? A. No.

Q. When you left China at this time for Hawaii did your mother send any messages to her old friends here? A. No.

Q. Did she not tell you to visit any of the people she used to know after you were admitted?

A. No.

Q. Did your father give you any messages?

A. No.

Q. Who is there in Hawaii that you know and can identify? A. Lee Wo, Lee Yet.

Q. Any other here? A. No.

Q. Lots of people here from Sun Chin?

A. They are all that I know.

Q. Are you sure that there are not other people here that you know whom you have seen in peddling or at your father's store? A. No.

Q. When did you see Lee Wo last?

A. Two years ago.

Q. What is his village in China? A. Sun Chin.

Q. What is his other name? A. Lee Teu Hoo.

Q. What family has he in China?

A. His parents, wife and one son.

Q. What is the name of his father?

A. Lee Sin Sum.

(Testimony of Lee Leong.)

Q. What is the name of Lee Wo's wife?

A. Siu She.

Q. What is the name and age of the boy?

A. Lee Sau Tung; aged 7.

Q. When did you see Lee Yet last?

A. A little over a year ago.

Q. What is his other name?

A. Lee Kau Hoo.

Q. What family has he in China?

A. Father, his wife and daughter.

Q. What is the name of his father?

A. Lee Chan—Lee Ping Yip.

Q. Was he ever in Hawaii? A. I don't know.

Q. How long have you been acquainted with him?

A. Since I can remember.

Q. What is the name of Lee Yet's wife?

A. Lum She.

Q. What is the name and age of the daughter?

A. Lee Moy; aged 3.

Q. When was the first time that you saw Lee Yet?

A. Over 10 years ago.

Q. When did Lee Yet first come to Hawaii?

A. Over 20 years ago.

Q. Do you know how many times he has been back to China? A. Two or three times.

Q. Any further statement that you wish to make?

A. No.

(S.) _____.

Subscribed and sworn to before me this 14th day of March, 1913.

(S.) HARRY B. BROWN,
Imm'g't and Act'g Chinese Insp.

(Testimony of Lee Yet.)

The foregoing testimony has been translated to the affiant by me and before signing he has acknowledged that it is a correct record and that he fully understood the same.

(S.) TONG KAU,
Interpreter.

[Testimony of Lee Yet.]

Case of LEE LEONG, as "Siberia," March 10, 1913.

Inspector MERLEN J. MOORE.

Interpreter, CHUCK HOY.

Witness LEE YET, sworn, testifies: C. R. No. 10652, Lee Yet, verified 11/29/10.

Q. What are your names?

A. Lee Yet and Lee Kau Hoo.

Q. How old are you? A. 37 years old.

Q. Where were you born?

A. Sun Chin, China.

Q. When did you first come to Hawaii?

A. When I was 22 years old.

Q. Have you been back since?

A. Yes, two times.

Q. When did you go back the first time?

A. K. S. 26 (1900).

Q. When did you go back the second time?

A. 1911.

Q. Are you married?

A. Lum Shee; 30 years old; bound feet; living in the Sun Chin village. [24]

Q. Have you children?

A. One daughter, no sons; Lee Moy, 2 years old; born after I left China.

(Testimony of Lee Yet.)

Q. What is your occupation?

A. I am butcher working at the Paragon market, Honolulu.

Q. How long have you worked for the Paragon?

A. About 3 months.

Q. What did you do before that?

A. I was a member and planting vegetables at Hop Wo vegetable plantation, at Pawaa, Oahu.

Q. How long were you planting vegetables?

A. Since I returned from China, 1911.

Q. What is your object in coming to this office to-day?

A. Witness for Lee Leong.

Q. Are you any relation to him?

A. His grandfather and my grandfather were brothers.

Q. Is Lee Leong married?

A. Yes, to Lum Shee; don't know age.

Q. Did you ever see this Lum Shee?

A. Yes.

Q. What kind of feet has she?

A. Bound feet.

Q. Have they any children?

A. I don't know.

Q. When was Lee Leong married?

A. I don't know; he was married when I was in China last.

Q. Do you know Lee Leong's father's name?

A. Lee Sing, or Lee Chuck.

Q. Do you know Lee Leong's mother's name?

A. Lum Shee, 50; bound feet.

Q. Has Lee Leong any brothers or sisters?

A. One sister, no brothers; we called her Lee Moy; 23 or 22 years old.

(Testimony of Lee Yet.)

Q. Is she married?

A. I think she is married to Mr. Wong, Ban Mee Yuen village.

Q. When was she married?

A. I don't know; she was married when I was last in China.

Q. Has she children? A. I don't know.

Q. Are the paternal grandparents of Lee Leong living? A. No; both are dead.

Q. When did they die? A. Long time ago.

Q. Do you know their names?

A. Lee On Sum and Wong She.

Q. Are his maternal grandparents living?

A. I don't know.

Q. Has Lee Leong's father any brothers or sisters?

A. He has one brother, Lee Ming, but he is in a foreign country.

Q. Where is he now?

A. Not in a foreign country; but a long distance from his home village.

Q. When was Lee Ming last in the Sun Chin village to your knowledge?

A. I have not seen him for 10 years.

Q. Did you see Lee Ming ten years ago?

A. I saw him before I first came to Hawaii.

Q. That is about 15 years ago? A. Yes.

Q. Did you see Lee Ming in China in 1900 when you were in China? A. No.

Q. Where was Lee Ming at that time?

A. No, he was in Dow Mon at that time.

Q. Is he a blood brother of Lee Sing, applicant's

(Testimony of Lee Yet.)

father? A. Yes.

Q. How old is Lee Ming? A. I don't know.

Q. Is he older or younger than Lee Sing?

A. Younger.

Q. Has Lee Sing a sister? A. No.

Q. Did he ever have any brothers or sisters who died? A. I do not know.

Q. What was Lee Sing doing in the Sun Chin village when you were there in 1910 and 1911?

A. He had a little store there.

Q. What kind of a store was it?

A. Merchandise and small candies and crackers.

Q. Do you know the name of that store?

A. Ming Lee.

Q. What was Lee Sing doing in 1900 when you were there?

A. Nothing—planting a little vegetables at that time.

Q. What was Lee Leong doing when *you* in China in 1910–1911?

A. He was in the same store and selling pork.

[25]

Q. What were his duties there?

A. He was a butcher in the store.

Q. Then I understand they carried a line of meat in the store? A. Yes, pork only.

Q. Did you visit Lee Sing's house on your visit in 1910? A. Yes.

Q. How far is your house from Lee Sing's house in the Sun Chin village?

A. From here to the Capitol Building. (About three-fourths mile.)

(Testimony of Lee Yet.)

Q. How large is the Sun Chin village?

A. 400 or 500 houses.

Q. How long did you stay in the Sun Chin village on your last visit there? A. About 7 months.

Q. Did you make frequent visits to Lee Sing's house?

A. Once in a while; don't remember how many times.

Q. Where was Lee Leong born?

A. Waikiki, Honolulu.

Q. Whereabouts at Waikiki?

A. In Kong Sing's banana plantation.

Q. Were you living at that time in Hawaii?

A. No.

Q. Then how do you know he was born in Waikiki?

A. His parents said so, and it was common knowledge in the village.

Q. Do you know when Lee Sing first came to Hawaii? A. I do not know.

Q. Do you know when Lee Sing's wife came to Hawaii? A. No.

Q. Did you ever see Lee Sing in Hawaii?

A. No.

Q. Did you ever see Lum She, his wife in Hawaii?

A. No.

Q. Did you ever see Lee Leong in Hawaii?

A. No.

Q. How old was Lee Leong when you first saw him? A. 3 or 4 years old.

Q. Where did you see him? A. Sun Chin.

(Testimony of Lee Yet.)

Q. Then you do not know whether Lee Sing was ever in Hawaii or not?

A. No; I was young at that time.

Q. How long did you know Lee Leong after you saw him when he was 3 or 4 years in the Sun Chin village before you came to Hawaii?

A. Five or six years.

Q. Then how old was Lee Leong when you came to Hawaii? A. 8 or 9 years old.

Q. Did you see Lee Leong before you came to Hawaii for the first time? A. Yes.

Q. And he was 8 or 9 years old at that time?

A. Yes.

Q. Did Lee Leong ever tell you he was born in Hawaii? A. Yes.

Q. When did he tell you that?

A. The last time I was in China, 1910.

Q. Did Lee Leong tell you that he was born in Hawaii before you came to Hawaii, or when he was 8 or 9 years old? A. Yes.

Q. What did he tell you at that time?

A. He was in my house and was talking and he said his father and mother had been in Hawaii and that he was born in Hawaii.

Q. When did he tell you this?

A. Just a short time before I came to Hawaii.

Q. Did Lee Leong know that you were coming to Hawaii at that time? A. I think he knew it.

Q. Did you tell him that you were coming to Hawaii? A. No.

Q. Then how is it that he happened to tell you

(Testimony of Lee Yet.)

that he was born here?

A. I may have spoken to him about it but I forget now. But the last time he told me.

Q. What did he tell you about being born in Hawaii in 1910?

A. He said to me that he would like to return to Hawaii because he was born here, and he asked me to get a paper for **him to come**.

Q. Was that all? A. Yes.

Q. Did Lee Leong ever speak to you about being born in Hawaii on any other occasion? A. No.

Q. Did you speak about his Hawaiian birth when you were in China in 1900? A. Yes.

Q. What did he tell you in 1900?

A. He told me that he was born here and asked me about Hawaii.

Q. Did Lee Sing ever talk to you about Lee Leong being born in Hawaii? A. Yes. [26]

Q. When did he talk to you about this matter?

A. Every time I was in China.

Q. Did Lum She, applicant's mother, ever talk to you about it? A. Yes.

Q. Did they talk to you about Lee Leong being born here before you came to Hawaii the first time?

A. Yes.

Q. Did Lee Sing and his wife talk to you about Lee Leong's Hawaiian birth in the presence of Lee Leong before you came to Hawaii?

A. I remember Lee Sing and Lum She were present.

Q. Do you remember of any conversation you had

(Testimony of Lee Yet.)

concerning the birth of Lee Leong prior to your coming to Hawaii when Lee Leong was present?

A. I remember one time Lee Leong was present with his parents but Lee Leong did not say anything about it.

Q. Then, as I understand it, the subject of the Hawaiian birth of Lee Leong was frequently discussed in Sun Chin prior to your coming to Hawaii?

A. Yes, but Lee Leong was small then.

Q. Who paid Lee Leong's passage?

A. I think his parents did.

Q. Did you send the money? A. No.

Q. Have you anything further to say? A. No.

(S.) _____.

Subscribed and sworn to before me this 15th day of March, 1913.

(S.) MERLEN J. MOORE,
Imm. and Act. Chinese Insp.

The foregoing testimony has been translated by me to affiant named therein and before signing he has acknowledged it to be correct.

(S.) CHUCK HOY,
Interpreter.

[Testimony of Lee Wo.]

Case of LEE LEONG.

Witness LEE WO, sworn, testifies: C. R. 4807,
Lee Wo, certified July 5, 1905.

Q. What are your names?

A. Lee Wo and Lee Hoo.

Q. How old are you? A. 41 years old.

(Testimony of Lee Wo.)

Q. Where were you born?

A. Sun Chin, China.

Q. When did you first come to Hawaii?

A. About 17 years ago.

Q. Have you been back since?

A. Twice, 1905, first time.

Q. Have you ever been to China since?

A. In 1910.

Q. How long were you in Sun Chin village on your 1910 trip? A. 8 or 9 months.

Q. Are you married?

A. Yes, to Siu Shee; 26; natural feet.

Q. Have you any children?

A. One son, Lee Sau Tong, 8 years old; no girls.

Q. What is your occupation?

A. Carpenter, Honolulu.

Q. How long have you been a carpenter?

A. Many years.

Q. What is your object in coming here to-day?

A. Come to be a witness for Lee Leong.

Q. Where was he born?

A. I don't know; I know he was in the Hawaiian Islands.

Q. Do you know whereabouts in the Hawaiian Islands?

A. I do not know; I was in China at that time.

Q. Are Lee Leong's parents living? A. Yes.

Q. Do you know them personally? A. Yes.

Q. What are their names?

A. Lee Sing, and Lee Chuck Hing, over 50, and mother's name Lum She, over 40.

(Testimony of Lee Wo.)

Q. What kind of feet has Lum She?

A. Used to be bound feet.

Q. When did you last see Lum She?

A. About 2 years ago.

Q. Did she have bound feet at that time?

A. I saw that she had bound feet. [27]

Q. Are you any relation to Lee Sing?

A. Distant cousin; same family name.

Q. Has applicant Lee Leong any brothers or sisters?

A. No; he has no brothers, just one sister.

Q. Do you know her name?

A. Lee Moy; about 21 or 22 years old.

Q. Did you see her when you was in China in 1910? A. No.

Q. When did you last see her?

A. Before I came to Hawaii over 17 years ago.

Q. How old was she at that time?

A. Four or five years old.

Q. Where was she born?

A. Also born at Honolulu.

Q. You say she was born in Honolulu also; do you infer that Lee Leong was born in Honolulu?

A. Yes; I heard that he was born in Honolulu.

Q. Whereabouts at Honolulu?

A. I think it was Waikiki.

Q. Where is Waikiki?

A. I heard that he was born at Kong Sing's banana plantation.

Q. You told me a few months ago that you did not know where Lee Leong was born, but that he was

(Testimony of Lee Wo.)

born somewhere in the Hawaiian Islands; now you give me the exact spot. A. I forget.

Q. How old was Lee Leong when you first saw him? A. 3 or 4 years old.

Q. How long did you know him after he was 3 or 4 years old?

A. About 7 or 8 years before I came to Hawaii. I mean I knew him until he was 7 or 8 years old before I came to Hawaii.

Q. Do you mean that Lee Leong was 7 or 8 years old when you came to Hawaii? A. Yes.

Q. Did Lee Leong ever tell you that he was born in Hawaii?

A. No, but the people about the village and his parents told me.

Q. Did Leong's parents ever tell you that he, Lee Leong, was born in Hawaii prior to your coming here? A. Yes.

Q. Did you ever visit the house Lee Sing in the Sun Chin village before you first came to Hawaii?

A. Yes.

Q. Did you visit that home frequently?

A. Yes, once in a while.

Q. Did you generally see Lee Leong in the house?

A. Yes.

Q. And on such occasions did you ever talk about Lee Leong being born in Hawaii? A. Yes.

Q. And was Lee Leong ever present when you were talking about his birth?

A. He was present, but I do not know whether he listened or not.

(Testimony of Lee Wo.)

Q. Did Lee Leong ever tell you that he was born in Hawaii?

A. Yes, the last time I was in China he was talking to me about it.

Q. You just told me a moment ago that he never did tell you anything about his birth.

A. He did the last time.

Q. When was the last time you were in China?

A. Year before last.

Q. What did he tell you at that time?

A. He said that he was born here and would like to return back here again if he could.

Q. Did you ever see applicant's parents in Hawaii? A. No.

Q. Did you ever see applicant Lee Leong in Hawaii? A. No.

Q. Then as far as you know you do not know whether applicant Lee Leong was ever in Hawaii or not?

A. No, only hear people say so, and I know he went from China to Hawaii at that time.

Q. Do you remember the arrival of the applicant from Hawaii?

A. Yes, and they mentioned they were from Hawaii.

Q. How old was applicant at that time?

A. About 4 years old.

Q. Did applicant return alone?

A. His parents were with him.

Q. Anyone else? A. And sister.

Q. Is Lee Leong married?

(Testimony of Lee Wo.)

A. Yes, he was married before I went to China last.

Q. Do you know his wife's name?

A. Lum She, don't know age.

Q. Did you ever see Lum She? A. Yes.

Q. What kind of feet has she?

A. Bound feet.

Q. Have they any children?

A. One son, very small infant when I was in China.

Q. Are your parents living?

A. Mother living. [28]

Q. When did your father die?

A. 37 years ago, on—when I was 4 years old.

Q. What was his name? A. Lee Sing Yip.

Q. He *be* another name? A. Lee You.

Q. What is your mother's name?

A. Siu Shee.

Q. Have you anything further to say?

A. No.

(S.) _____.

Subscribed and sworn to before me this 14th day of March, 1913.

(S.) MERLEN J. MOORE,

Immi. and Act. Chinese Inspector.

The foregoing testimony has been translated by me to affiant named herein and before signing he has acknowledged it to be correct.

(S.) CHUCK HOY,

Interpreter.

[Testimony of Siu Sam.]

Case of LEE LEONG.

Witness SIU SAM (Siu Shee) sworn, testifies:

C. R. No.

Q. What are your names?

A. Siu Shee, and Siu Sam; no other name.

Q. How old are you? A. 50 years old.

Q. Have you a certificate of residence?

A. Yes, but I forgot to bring it. (Witness instructed to present same at this office.)

Q. Where were you born?

A. Na, Mon, China.

Q. When did you first come to Hawaii?

A. 30 years ago.

Q. Are you married?

A. Yes, to Lee Mung, and Lee Ngin Ngip.

Q. How old is he? A. 64 years old.

Q. Is he living?

A. Yes, Honolulu, Wailae.

Q. Have you any children?

A. Four sons and six daughters.

Q. Where were your children born?

A. All born in Hawaii.

Q. *What* your husband's occupation?

A. Nothing.

Q. What did he used to do?

A. Planting taro and banana about Honolulu.

Q. When did he first come to Hawaii?

A. When he was 26 years old.

Q. Have you ever been to China since coming here 30 years ago? A. No.

(Testimony of Siu Sam.)

Q. What is your object in coming here to-day?

A. I have come to be a witness for Lee Leong, son of Lee Sing.

Q. What is Lee Sing's other name?

A. I do not know.

Q. Do you know Lee Leong's mother's name?

A. Lum She, 49; bound feet.

Q. Was she ever in Hawaii? A. Yes.

Q. Was Lee Sing ever in Hawaii? A. Yes.

Q. Do you know when he came to Hawaii?

A. I don't know.

Q. Do you know when Lum She came to Hawaii?

A. She came here a short time before I came.

Q. And you came here 30 years ago?

A. I saw her at Kong Sing banana plantation at Waikiki.

Q. When did you first see her there?

A. When I first landed here.

Q. How long had she been in Hawaii before that?

A. I don't know; I think a few months before I came.

Q. Was Lee Sing in Hawaii then? A. Yes.

Q. Was he the husband of Lum Shee at that time?

A. Yes.

Q. How many children did Lum Shee have when you first came here? A. No children.

Q. Did Lum Shee ever have any children born to her in Hawaii? A. Yes.

Q. Did you live with Lum She after you came to Hawaii? A. No, but a short distance away.

Q. How far away? A. A few hundred feet.

(Testimony of Siu Sam.)

Q. How long after you came here was it before Lum Shee had children?

A. Four or five years.

Q. Then Lum Shee and Lee Sing lived together as man and wife for four or five years without children; is that right? A. Yes.

Q. Rather unusual, don't you think, for Chinese people? A. Sometimes that way. [29]

Q. How many children did Lum Shee have in Hawaii? A. Son and daughter.

Q. Do you know the names of those children?

A. Lee Leong and Lee Moy.

Q. How many years is there between Lee Leong and Lee Moy? A. About 2 years.

Q. Did Lum Shee have any children born in Hawaii, who died? A. No.

Q. Did Lum Shee have any children born in China? A. I don't know.

Q. How long did Lee Sing and Lum Shee continue to live at Waikiki after you came here?

A. I don't remember.

Q. About how long? A. About 10 years.

Q. And were you living at Waikiki all that time?

A. I lived there about 10 years, and then I moved to Pauoa and lived there 10 years.

Q. Was Lee Sing still living at Waikiki when you moved away?

A. No, he left for China a short time before I moved to Pauoa.

Q. How old was Lee Leong when you last saw him?

(Testimony of Siu Sam.)

A. I first saw him when he was three or four days old, and about four years old when I last saw him.

Q. Were there any other Chinese living in the immediate neighborhood besides your family and Lee Sing's family at the time of Lee Leong's birth?

A. Yes, another family, Lee Ming.

Q. Was he any relation to Lee Sing?

A. Same family and from the same village.

Q. Was Lee Ming the blood brother of Lee Sing?

A. No.

Q. Was Lee Ming married? A. Yes.

Q. What was her name?

A. Wong Shee; bound feet.

Q. Did she have children? A. Two sons.

Q. Give me their names.

A. Lee Kum Kee and Lee Hai Ho.

Q. Do you think you could identify Lee Leong if you were to see him now?

A. No, so small when he went away.

Q. Do you know what year Lee Sing returned to China with his family? A. No.

Q. Can you tell me about what year? A. No.

Q. Is Lee Leong married? A. I don't know.

Q. Have you anything further to say? A. No.

(S.) XXX SIU SAM (her mark).

Subscribed and sworn to before me this 14th day of March, 1913.

(S.) MERLEN J. MOORE,
Immi. and Act. Chinese Inspector.

(Testimony of Lee Keau.)

The foregoing testimony has been translated by me to affiant named therein and before signing she has acknowledged it to be correct.

(S.) CHUCK HOY,
Interpreter.

[Testimony of Lee Keau.]

Case of LEE LEONG.

Witness LEE KEAU (KOW), sworn, testifies: C.
R. No. 486, Lee Keau. Verified Oct. 25, 1910.

Q. What are your names?

A. Lee Keau (Kow) and Lee Look Hoo.

Q. How old are you? A. 30 years old.

Q. Where were you born? A. Sun Chin.

Q. When did you first come to Hawaii?

A. K. S. 23 (1897).

Q. Have you been back to China since?

A. Yes, in 1910.

Q. How long did you stay in Sun Chin village on that occasion? A. About 10 months.

Q. Are you married?

A. Yes, to Lum Shee; 22; natural feet.

Q. Have you any children?

A. One son, Lee Chan; 2 years old now.

Q. What is your occupation?

A. Rice planter, at Pawaa, Honolulu.

Q. What is your object in coming to this office to-day? A. Witness for Lee Leong.

Q. Where was he born?

A. Waikiki, Honolulu.

Q. How do you know that?

A. I was in the Sun Chin village at the time the

(Testimony of Lee Keau.)

boy reached China from Hawaii and everybody called him foreign boy.

Q. How old were you at that time?

A. Four or five years old.

Q. Do you remember Lee Leong coming from Hawaii to your native village? A. Yes. [30]

Q. And how old did you say you were?

A. About ten years old at that time.

Q. You have just stated you were three or four years old? A. I mean Lee Leong was.

Q. Who was with Lee Leong at the time he returned from Hawaii? A. His parents.

Q. Do you know their names?

A. Lee Sing; don't know his other name.

Q. Do you know the name of Lee Leong's mother?

A. Lum Shee.

Q. What kind of feet has she? A. Bound.

Q. How old was Lee Leong the last time you saw him? A. About 20 or more.

Q. How old was he at the time you first came to Hawaii? A. About 10 years old.

Q. Did Lee Leong ever tell you that he was born in Hawaii? A. Yes.

Q. Did he ever tell you that he was born in Hawaii before you came here? A. Yes.

Q. How old was Lee Leong at that time?

A. 8 or 9 years old.

Q. What did he tell you?

A. Someone called him a foreign boy, and then he told me that he was born in the Hawaiian Islands.

Q. When you found out or determined to come to

(Testimony of Lee Keau.)

Hawaii did you ask him anything about the Islands?

A. No.

Q. Why didn't you if you knew he was born here?

A. I lived far distance from him, and did not have time to talk.

Q. Did you live in the same village with him?

A. Yes.

Q. Did Lee Sing or Lum Shee ever tell you that Lee Leong was born here? A. Yes.

Q. When did they tell you?

A. Before I first came to Hawaii, and the last time I went to China.

Q. Was Lee Leong present when you were talking about his birth in Hawaii with his parents?

A. No.

Q. Do you remember of a single instance when Lee Leong was present?

A. Yes, I remember once.

Q. When was this?

A. Before I first came to Hawaii.

Q. Do you remember any other time?

A. No, just once.

Q. What did Lee Leong tell you about this birth in Hawaii when you were in China in 1910?

A. He said that he wished to return to Hawaii and told me that he was born here.

Q. Is he married? A. Yes.

Q. What is his wife's name?

A. I don't know.

Q. Did you ever see her? A. No.

Q. Has Lee Leong any children?

(Testimony of Lee Keau.)

A. I don't know.

Q. Did you ever hear anyone say? A. No.

Q. Has Lee Leong any brothers or sisters?

A. One sister, Lee Moy, I think.

Q. How old is she?

A. One or two years younger than Lee Leong; she is married.

Q. How do you know she is married?

A. I heard her mother say so.

Q. When did you last see Lee Moy?

A. Before I first came to Hawaii.

Q. How old was she then?

A. Same as Lee Leong.

Q. About how old was she when you came to Hawaii?

A. (After figuring and counting for several minutes) 6 or 7 years old.

Q. Where was she born? A. Hawaiian Islands.

Q. Did you ever see Lee Leong in Hawaii?

A. No.

Q. Then you don't know whether he was born in Hawaii or not?

A. No, but his parents said so, and it was common knowledge of the people.

Q. Did you ever deliver any money or take a package from Hawaii to applicant or his parents in China? A. No.

Q. Did you visit applicant's house when you were in China? A. Yes.

Q. Did you call there very often?

A. Several times. [31]

(Testimony of Lee Keau.)

Q. When was Lee Leong married?

A. Before I went to China in 1910.

Q. Do you think you could identify applicant if you were to see him now? A. Yes.

Q. Have you anything further to say?

A. No.

(S.) _____

Sworn and subscribed to before me this 14th day of March, 1913.

(S.) MERLEN J. MOORE,
Imm. and Act. Chinese Inspector.

The foregoing testimony has been translated to affiant named therein by me, and before signing he has acknowledged it to be correct.

(S.) CHUCK HOY,
Interpreter.

[Testimony of Lee Chew.]

Case of LEE LEONG.

Witness LEE CHEW, sworn, testifies: C. R. No. 4875, not verified.

Q. What are your names?

A. Lee Chew, and no other name.

Q. Are you married? A. No.

Q. Were you ever married? A. No.

Q. How old are you? A. 49 years old.

Q. Where were you born?

A. Sun Chin, China.

Q. When did you first come to Hawaii?

A. K. S. 11 (1886).

Q. Have you ever been to China since? A. No.

(Testimony of Lee Chew.)

Q. What is your occupation?

A. Peddling vegetables.

Q. Have you always peddled vegetables in Hawaii?

A. No, for the last five years or six years.

Q. What did you do when you first came to Hawaii? A. Rice planter at Palolo, Honolulu.

Q. How long did you plant rice at Palolo?

A. About 1 year.

Q. And then what did you do?

A. Then I went to Waikiki and worked for Kong Wo banana plantation.

Q. Was that plantation known by any other name?

A. No.

Q. Did you ever hear of the Kong Sing banana plantation? A. Yes.

Q. Where is that plantation?

A. Yes, Kong Sing is on the upper part of the Kwong Wo In.

Q. Are they two separate plantations? A. Yes.

Q. Are those plantations still in existence to-day?

A. Yes.

Q. Were they in existence when you first came to Hawaii?

A. Yes, only they have changed hands, but are called the same names.

Q. Are you sure of that? A. Yes.

Q. How long did you work for the Kwong Wo In?

A. About a year and two months.

Q. Then where did you go?

A. Then I went out and peddled fruits.

Q. Where? A. In Honolulu.

(Testimony of Lee Chew.)

Q. Where did you live when you were peddling fruits? A. Maunakea Street.

Q. Then you were not living at Waikiki at that time? A. No.

Q. What is your object in coming here to-day?

A. Witness for Lee Leong.

Q. Where was he born? A. Waikiki.

Q. Do you know his parents? A. Yes.

Q. Give me their names?

A. Lee Sing, don't know his other name, Lum Shee.

Q. Were these people ever in Hawaii?

A. Yes, living at Waikiki.

Q. Where at Waikiki?

A. He was working for the Kong Sing banana plantation.

Q. Did Wong Sing come to Hawaii before you did? A. Yes.

Q. How long before?

A. I don't remember, but I saw him when I first came here.

Q. Did you know him in China? A. No. [32]

Q. Explain, then, how you saw him immediately upon your arrival here?

A. I went to work for a plantation right near him.

Q. Was Lee Sing married when you first came to Hawaii?

A. I don't know when he married, but I saw his wife there.

Q. How long had you been in Hawaii was it before you met Lee Sing? A. About one year.

(Testimony of Lee Chew.)

Q. Did you know Lee Sing when you were living in Palolo? A. No.

Q. Then how did you know that Lee Sing came to Hawaii before you did? A. He said so.

Q. Then, as I understand it, Lee Sing was at Waikiki with his wife when you went there?

A. Yes.

Q. Did they have any children at that time?

A. No, not at that time.

Q. Did Lum Shee, Lee Sing's wife, ever have children in Hawaii? A. Yes.

Q. How many children?

A. One son and one daughter.

Q. Were you living at Waikiki when these children were born? A. No.

Q. Do you know their names?

A. Lee Leong, 23 or 24 now, and Lee Moy, 21 or 22 years old.

Q. When were these children born?

A. K. S. 15 or 16.

Q. How do you know?

A. Because they invited me to be present at a dinner when the boy was one month old.

Q. Where were you living at that time?

A. Maunakea Street.

Q. How many times did you call at Lee Sing's home when you were living at Maunakea Street?

A. Very often, once a week or two or three times a month, for I was buying bananas there.

Q. How did you make these visits?

A. About five or six years.

(Testimony of Lee Chew.)

Q. Then why did you discontinue making your visits?

A. Because I quit my job and then went to Waialua.

Q. Then as I understand it that you went from Palolo to Waikiki, and lived there for a year and two months, and then went to Maunakea Street and lived five or six years, and then you moved to Waialua?

A. Yes.

Q. After you had moved to Waialua did you ever visit Lee Sing at Waikiki? A. No.

Q. Was Lee Sing living at Waikiki when you moved to Waialua? A. Yes.

Q. Is Lee Sing living at Waikiki now?

A. No, he has gone to China.

Q. Do you know when he went to China?

A. About 20 years.

Q. Where were you living when Lee Sing went to China? A. Waialua.

Q. How *long* was Lee Leong when you first saw him? A. 3 or 4 years old.

Q. How many children did Lum Shee have born to her in Hawaii? A. Two.

Q. Did she have any that died? A. No.

Q. Is Lee Leong married? A. I don't know.

Q. Do you think you could identify Lee Leong if you were to see him to-day? A. No.

Q. Have you anything further to say?

(S.) _____

(Testimony of Lee Leong.)

Subscribed and sworn to before me this 14th day of March, A. D. 1913.

(S.) MERLEN J. MOORE,
Immi. and Act. Chinese Inspector.

The foregoing testimony has been translated by me to affiant named therein, and before signing he has acknowledged it to be a correct record.

(S.) CHUCK HOY, Interpreter. [33]

[Testimony of Lee Leong (Recalled).]

Case of LEE LEONG.

Applicant recalled, sworn, testifies:

Intpr. TONG KAU.

Q. What are your names?

A. Lee Leong; no others.

Q. You testified in the matter of your application to land on the 14th instant, did you not?

A. Yes, the other day.

Q. What have you been doing in China?

A. Help my father in his store and carry things to sell.

Q. What has your father in his store?

A. Merchandise and papers goods.

Q. Anything else? A. And pork.

Q. Did you ever work in the pork?

A. I am not a butcher, but I carried pork to sell.

Q. How many children have you?

A. One boy, only.

Q. What is his name? A. Lee Sau Kun.

Q. Give me the date of his birth?

A. 6th month, 24th day, ST. 3 (July 18, 1911).

Q. Do you know a man by the name of Lee Yet?

(Testimony of Lee Leong.)

A. Yes.

Q. When did you see him last?

A. A little over one year ago.

Q. Was he in China then? A. Yes.

Q. Did he visit your house in China on that occasion? A. Yes.

Q. How many times? A. Often.

Q. How long was he in China about a year ago?

A. 6 or 7 months.

Q. Did he see your wife at that time?

A. Yes.

Q. Did he see her very often? A. Yes.

Q. Did he see your boy at that time? A. Yes.

Q. How old was your boy when Lee Yet was in China? A. Not quite one month.

Q. Do you know a man by the name of Lee Wo?

A. Yes.

Q. When did you see him last?

A. About one year ago.

Q. He was in China and in your village at the same time Lee Yet was, was he not? A. Yes.

Q. Did he ever accompany Lee Yet on a visit to your house in China? A. Yes.

Q. And did he see your wife and child in China?

A. Yes.

Q. How long was Lee Wo in your village?

A. Nearly 10 months.

Q. Do you know a man by the name of Lee Keau or Lee Look Hoo? A. No.

Q. He identified you as Lee Leong?

A. Yes, but I did not identify him.

(Testimony of Lee Leong.)

Q. Did you ever see him in China? A. Yes.

Q. When did you see him in China?

A. Two years ago.

Q. Did he visit your house in China two years ago?

A. Yes.

Q. And did he see your wife and child at that time?

A. No.

Q. How long have you known Lee Keau?

A. Over 5 years ago.

Q. Was he in China 5 years ago?

A. I don't remember.

Q. Then why five years ago.

A. He was in China before, I know him before he came to this island.

Q. How old were you when you knew Lee Keau in China? A. A little over 10 years.

Q. Did you ever tell Lee Keau that you were in Hawaii? A. No.

Q. Did you ever tell him that you were born in Hawaii in 1910? A. Yes.

Q. Did you ever tell him that you were born in Hawaii before he came to Hawaii? A. No.

Q. Has your father any brothers or sisters?

A. No.

Q. Did you ever hear of a name of "Lee Pung"?

A. No.

Q. Has your father a brother by that name?

A. No.

Q. Did you ever hear of a man by the name of Lee Ming? A. I don't know.

Q. Did you ever hear of a man by the name of Lee

(Testimony of Lee Leong.)

Mung? A. No.

Q. Have you anything further to say? A. No.

Q. Have you understood the interpreter?

A. Yes.

Q. Are you related to Lee Yet?

A. His father's father is brother to my father's father.

(S.) _____

Witnesses Lee Yet, Lee Wo and Lee Keau taken to detention—[34]

Identification is mutual between witnesses Lee Yet and Lee Wo and applicant. Lee Keau identifies applicant, calling him Lee Leong; applicant cannot identify Lee Keau—does not know his name. Witnesses Lee Chew and Siu Sam do not identify applicant.

Case of Lee Leong, alleged Hawaiian born, Ex. Siberia March 10, 1913.

Honolulu, T. H., March 17, 1913.

This case presents discrepancies and contradictions, which are readily manifest, in regard to material points.

After a careful consideration of the record and testimony, I am of the opinion that there has been a failure to prove that the applicant, Lee Leong was born in Hawaii. He is therefore denied a landing and ordered deported to the country whence he came.

(S.) RICHARD L. HALSEY,

RLH.

Inspector in Charge.

Case of LEE LEONG, as "Siberia," March 10, 1913.

Additional testimony taken by order of the In-

(Testimony of Lee Lau.)

spector in Charge in the investigation of certain affidavits presented by counsel for the applicant, LEE LEONG.

Inspector, MERLEN J. MOORE.

Interpreter, TONG KAU.

[Testimony of Lee Lau.]

Witness LEE LAU sworn, testifies: C. R. No. 10500—not verified.

Q. What are your names?

A. Lee Lau and Lee Koi Yip.

Q. How old are you? A. 30 years old.

Q. Give me the date of your birth?

A. 1st month, 7th day; don't know what year.

Q. Where were you born? A. Sun Chin, China.

Q. When did you first come to Hawaii?

A. 1900.

Q. How old were you at that time?

A. I was 17 years old.

Q. Have you been back since? A. One time.

Q. When?

A. In 1910, I went to China, and returned in 1912.

Q. Do you know what date you returned, what steamer? A. In July last year, S. S. "Korea."

(Record in this office shows that this witness was issued merchant papers form 431; that he departed to China Jan. 24, 1911, as "Tenyo Maru," and arrived here from China by the S. S. "Korea" July 8, 1912 and was landed as a domiciled Chinese merchant July 8, 1912.)

Interpreter CHUCK HOY.

Q. Where did you say you were born?

(Testimony of Lee Lau.)

A. Sun Chin, China.

Q. Do you know the date and the steamer of your arrival here the first time?

A. I don't remember the steamer but I arrived here on the 3d months of K. S. 25 or 26 (1899-1900).

Q. What kind of papers did you have at that time?

A. I do not know. I think it was a traveling paper.

Q. Did you have any papers at all?

A. I was too young at that time, and I don't know.

Q. Were you traveling alone?

A. I followed Lee Choy Tin when he came.

Q. What kind of papers did he have?

A. I don't know.

Q. Is Lee Choy Tin related to you?

A. No, only same family of Lee.

Q. When you arrived here in K. S. 35 or 26 were you held in detention or were you landed from the ship?

A. Went to Quarantine Island.

Q. How long did you stay there? A. One week.

Q. Why were you kept there one week?

A. It used to be the rule.

Q. Was the ship quarantined because the ship had disease on board? A. I don't know.

Q. You were 17 years of age at that time, surely you were old enough to know something?

A. I was from the country and I was [35] brought in the country and I don't know much at that time.

(Note. All Chinese destined to the Hawaiian Is-

(Testimony of Lee Lau.)

lands were examined by Immigration Officers under the Chinese Exclusion Laws arriving after December 1, 1898.)

Q. Did you live in the Sun Chin village from the date of your birth to the time of your coming to Hawaii? A. Yes.

Q. Are you married?

A. Yes, to Lum Shee, 20; nat. feet; living, China; Sun Chin.

Q. Have you any children?

A. One son, Lee Chin; 2 years old.

Q. What is your occupation at this time?

A. Member and work for Hing Lee Chan store, corner Union and Hotel Streets, Honolulu.

Q. What is your object in coming here to-day?

A. Witness for Lee Leong.

Q. Are you related in any way to Lee Leong?

A. No relation.

Q. How old is he? A. 24 or 25 years old.

Q. Are his parents living?

A. Yes, in China, Sun Chin.

Q. Give me their names and about how old they are.

A. Lee Sing and also called Lee Chuck Hing, about 54 or 55 years old; mother Lum Shee; 44 or 45.

Q. What kind of feet has the mother?

A. Bound feet.

Q. Has Lee Leong any brothers or sisters?

A. One sister, Lee Moy; 21 or 22.

Q. Did you ever see his sister?

A. Yes, when she was young.

(Testimony of Lee Lau.)

Q. Did you ever see her in China in 1911?

A. No, she is married.

Q. How long has she been married?

A. I don't know.

Q. Where was applicant born?

A. Waikiki, Honolulu.

Q. How do you know he was born at Waikiki?

A. I used to play with him in China and he told me so.

Q. How old was applicant when you used to play with him?

A. I mean that it was the last time in 1910, and I don't mean it was before that.

Q. Do you mean that you did not play with applicant in China?

A. Yes, I did play with him.

Q. Then what do you mean by saying it was the last time in 1910?

A. I was just acquainted with him at that time.

Q. How old was the applicant when you first saw him? A. 4 or 5 years old.

Q. How is it he was 4 or 5 years old before you saw him?

A. Because he was—he came from Hawaii to China.

Q. How do you know that he came from Hawaii?

A. His parents said so.

Q. Where was Lee Leong when you first saw him?

A. Sun Chin village.

Q. Did you see him about the village, or did you see him when he first came from Hawaii?

(Testimony of Lee Lau.)

A. I first saw him in the street.

Q. Was he alone in the street?

A. Playing with some other children.

Q. Did you stop and talk with him?

A. I did not talk to him, but so someone else in the village told me.

Q. Do you remember who it was told you?

A. Many people.

Q. What did they tell you?

A. Said that Lee Leong was born in Hawaii.

Q. Did Lee Leong ever tell you that he was born in Hawaii?

A. Yes, when I was in China in 1910.

Q. Did Lee Leong ever tell you that he was born in Hawaii prior to your coming here in 1899?

A. No.

Q. Did you ever hear Lee Leong tell anyone that he was born here? A. No.

Q. Did his parents ever tell you before you came here that their son was born in Hawaii?

A. No.

Q. Did you ever hear anyone else say that Lee Leong was born in Hawaii, that is, did you hear them speak of his birth in Hawaii prior to your coming here when you were 17 years old?

A. Yes, some people in the village.

Q. But neither applicant nor his parents told you about applicant's birth in Hawaii prior to your coming here? A. No.

Q. Did you make it your business to inquire where applicant Lee Leong was born?

(Testimony of Lee Lau.)

A. No, but I heard that his parents said so. [36]

Q. As a matter of fact, you never heard the Hawaiian birth of Lee Leong discussed until you returned to China in 1911? A. Yes, that is right.

Q. Then the first time you ever heard of Lee Leong being born in Hawaii was when you returned to China in 1911? A. Yes, that is right.

Q. Did you visit applicant Lee Leong's house in China when you were there in 1911? A. Yes.

Q. Is he married? A. Yes.

Q. Do you know his wife's name? A. No.

Q. Did you ever see her? A. Yes.

Q. Did you visit Lee Leong's house very often?

A. I called at his store very often.

Q. Did you ever visit of applicant's house, his home? A. They lived back of the store.

Q. In the same building? A. Yes.

Q. How many children has applicant's wife?

A. One son.

Q. Do you know his name? A. No.

Q. How old is this boy? A. 2 or 3 years old.

Q. Do you know the name of the store?

A. Ming Lee.

Q. Is applicant the owner of that store?

A. No, his father owns it.

Q. How did it happen that Lee Leong told you that he was born in Hawaii when you were in China on your trip in 1911?

A. He was asking me about Hawaii, and he said he would like to come to Hawaii and said that he was

(Testimony of Lee Lau.)

born here, and he asked me how he could come to Hawaii.

Q. What did you tell him?

A. I told him if he had a Hawaiian birth paper it would be easy for him, but he said he did not have one, and I told him to send word to his cousin to get a paper for him.

Q. And did Lee Leong do that? A. Yes, he did.

Q. Did you tell him that you would get this birth certificate or paper? A. No, I did nothing.

Q. Then as I understand it Lee Leong never mentioned his Hawaiian birth until this occasion?

A. Yes, that is right.

Q. As a matter of fact, you never talked to Lee Leong until you saw him in 1911; is that right?

A. Yes.

Q. Then I understand that the first time you ever saw Lee Leong was in 1911, or when he told you that he was born in Hawaii? A. Yes, that is right.

Q. Then all this testimony about seeing Lee Leong in China when he was about 3 or 4 years old is a mistake?

A. Yes, I did see him, but I never said anything to him.

Q. Do you think you can recognize applicant at this time? A. Yes.

Q. I want to ask you another question, and I want you to think well before you answer, that no mistake will be made. Did you or did you not see applicant prior to 1911 when you visited China?

A. This is the truth; I saw the boy in China, and

(Testimony of Lee Lau.)

when he was in China, and was 3 or 4 years old, but I did not recognize him, and when I was in China 1911, his parents told me that Lee Leong was the boy.

Q. Then you think you saw Lee Leong when he was in China when he was 3 or 4 years old, but you did not recognize him on your return in 1911?

A. That is right.

Q. Did you ever see Lee Leong in Hawaii?

A. No.

Q. Then you don't know of your own knowledge where Lee Leong was born? A. Yes.

Q. He might have been born in some other village in China, and have come to the Sun Chin village to live as far as you know?

A. I only know that his parents told me.

Q. And they never told you until 1911, is that right?

A. They never told me until 1911.

Q. Have you anything further to say? A. No.

(Signed in Chinese.) [37]

Witness Lee Lau taken to detention-room, where he identifies applicant.

Subscribed and sworn to before me this 1st day of April, 1912.

(S.) MERLEN J. MOORE,
Immig. & Act. Chinese Inspector.

The foregoing testimony has been translated by me to affiant by me and before signing he has acknowledged it to be a correct statement and thoroughly understood by him.

(S.) CHUCK HOY, Interpreter.

[Testimony of Lee Lung.]

Witness LEE LUNG, sworn, testifies: C. R. 12826
verified Mar. 41909.

Q. What are your names?

A. Lee Lun and Lee Bak Yip.

Q. How old are you? A. 34 years.

Q. Where were you born?

A. Sun Chin, China.

Q. When did you first come to Hawaii?

A. K. S. 23 (1897) I think.

Q. Do you remember what steamer?

A. "Belgic," 6th months Chinese last part.

Q. Have you been to China since?

A. Once; I think it was in 1910.

Q. What is your occupation?

A. Planting vegetables, member of Hop Wo Ying.

Q. Are you married?

A. Yes, to Lum Shee 21, bound feet, now in China; never in Hawaii; have one son Lee Tai, 3 years old; no daughters.

Q. How long did you remain in China when you were there the last time? A. 9 months.

Q. Did you stay in the Sun Chin village most of the time? A. Yes, all the time.

Q. What is your object in coming here to-day?

A. Witness for Lee Leong.

Q. Where was he born?

A. Waikiki, Hawaii.

Q. Were you in Hawaii at the time of his birth?

A. No.

Q. How old is Lee Leong?

(Testimony of Lee Lung.)

A. 24 or 25 years old.

Q. How old was Lee Leong when you first saw him? A. 4 or 5 years old.

Q. And where did you see him at that time?

A. Sun Chin.

Q. Explain to me how it is that you never saw Lee Leong until he was 4 or 5 years of age?

A. Because he was in the Hawaiian Islands.

Q. On what occasion did you see him in Sun Chin village?

A. He came to China from Hawaii with his parents.

Q. Did you see his parents bring him to the Sun Chin village? A. Yes.

Q. Do you mean that you were in the Sun Chin village and saw the parents of Lee Leong come to the village? A. Yes.

Q. Did they arrive by boat or how did they come?

A. They came by a small boat.

Q. And were you present when the boat arrived?

A. No, but I saw them pass coming into the village.

Q. Was that the first time you ever saw Lee Leong and his parents? A. Yes.

Q. You never knew his parents before that time?

A. No.

Q. How do you know that they came from Hawaii?

A. Common knowledge of the people.

Q. Do you know the names of applicant's parents?

A. Lee Sing, Lee Chuck Hing, and mother Lum Shee.

(Testimony of Lee Lung.)

Q. Do you remember ever seeing applicant after his arrival in the Sun Chin village?

A. Yes, very often.

Q. Did you ever talk to him? A. No.

Q. Did you become a friend of the family?

A. Not very well acquainted.

Q. Did you ever visit with applicant's parents at their home when applicant was a small boy?

A. Yes, a few times and at the times when Lee Leong's parents would give raisins which they had brought from Hawaii. [38]

Q. On these visits to Lee Leong's home was the Hawaiian birth of applicant spoken of?

A. Yes, the parents said so.

Q. How old were you when you came to Hawaii?

A. When I was 19 years old.

Q. How old was applicant at that time?

A. (After figuring and counting several minutes.)
About 8 or 9 years old.

Q. About how old were you when you first saw applicant? A. 12 or 13 years old.

Q. Did you visit applicant's home in China in 1910? A. Yes.

Q. Is he married? A. Yes.

Q. Do you know his wife's name?

A. Lum Shee.

Q. Has she any children?

A. I don't know.

Q. Where was applicant living in 1910?

A. Sun Chin village.

Q. Whereabouts in this village?

(Testimony of Lee Lung.)

A. Back of the Ming Lee store.

Q. Did you discuss the place of his birth with applicant at that time?

A. Yes, we were talking together and he was asking how the islands were now for business, and I said they were all right, and he mentioned and said that he was born here, and asked me how he could come here.

Q. Did you tell him how he could do it?

A. I said that I did not know.

Q. Did you tell him anything about getting a Hawaiian birth certificate? A. No.

Q. Did you recognize the Lee Leong you saw in China in 1910 as the same person you saw when a boy 4 or 5 years old in Sun Chin village?

A. No, but I went to his father's store and his father said so.

Q. Then you don't know of your own knowledge whether the boy you saw coming to the Sun Chin village is the same person you saw in China in 1910, do you? A. I don't know.

Q. Did you ever hear, prior to coming to Hawaii, anyone say that Lee Leong was born in Hawaii?

A. Yes, the neighbors said so.

Q. Did Lee Leong's parents tell you that Lee Leong was born in Hawaii?

A. His father said so.

Q. Did his father tell you that before you came to Hawaii? A. No.

Q. As a matter of fact, you never heard where Lee Leong was born prior to your coming to Hawaii?

(Testimony of Lee Lung.)

A. Oh, I heard it before I came to Hawaii.

Q. Did you make it your business to go and inquire where Lee Leong was born?

A. No, someone was talking and I just heard it.

Q. Did you hear it more than once?

A. Four or five times.

Q. Did you ever ask Lee Leong where he was born?

A. No.

Q. Did you ever ask his parents where he was born? A. I asked his father.

Q. What did his father tell you?

A. In Hawaii, that he was born here.

Q. Did he tell you where in Hawaii?

A. Yes, he said it was Waikiki.

Q. How old were you at that time?

A. About 13 years old.

Q. And you remember from that time to this that his father told you that applicant was born at Waikiki? A. Yes.

Q. Was Lee Leong present when his father told you that he was born in Hawaii? A. Yes.

Q. Was applicant's mother present? A. Yes.

Q. Where was it that the father told you this?

A. Lee Sing's house.

Q. How old was applicant at that time?

A. About 4 years old.

Q. Were you in Hawaii when applicant was born at Waikiki? A. No.

Q. Where were you? A. Sun Chin.

Q. Did you ever see applicant in Hawaii?

A. No.

(Testimony of Lee Lung.)

Q. Then you don't know of your own knowledge where applicant was born? Is that right?

A. No, but his parents said so. [39]

Q. Has applicant any brothers or sisters?

A. One sister.

Q. Where was she born? A. Also born here.

Q. Was she taken to China with her parents?

A. Yes.

Q. Did you see her on her arrival in the Sun Chin village? A. Yes.

Q. How old was she at that time?

A. About 2 years old.

Q. As I understood you you are not now in a position to identify the boy who arrived in the Sun Chin village, aged 4 or 5 years as the same person you now know as Lee Leong, the person you saw in China in 1910?

A. No, I did not recognize him, but his father said he was the same boy.

Q. Then all you know about it is that applicant's father told you that he was the same boy?

A. Yes.

Q. Have you anything further to say? A. No.

Subscribed and sworn to (Signed in Chinese) day of April, 1913.

(S.) MERLEN J. MOORE,

Immig. & Act. Chinese Inspector.

The foregoing testimony has been translated to affiant named therein by me, and before signing he

(Testimony of Lee Sau.)

has acknowledged it to be true and correct and understood by him.

(S.) CHUCK HOY,
Interpreter.

[Testimony of Lee Sau.]

Witness LEE SAU called, testified: C. R. #7686
verified 9/9/07.

Witness sworn, testifies:

Q. What are your names?

A. Lee Sau and Lee Gun Ho.

Q. How old are you? A. 38 years old.

Q. Where were you born? A. Sun Chin, China.

Q. When did you first come to Hawaii?

A. 16 years ago.

Q. Whose signature is this appearing here on this
affidavit? A. Mine.

Q. Have you been to China since?

A. One time in 1907, and returned one year later.

Q. Are you married?

A. To Ng She; 25; natural feet; now in China,
never in Hawaii, one son Lee Choy 4 years old.

Q. Where was Lee Choy born? A. Sun Chin.

Q. What is your occupation?

A. Member and work for Hop Wo Yuen vegetable
plantation.

Q. What is your object in coming here today?

A. To be a witness for Lee Leong.

Q. How old is he? A. 25 years old.

Q. Is he married? A. Yes.

Q. Do you know his wife's name?

(Testimony of Lee Sau.)

A. I don't know; only heard he was married.

Q. Have they any children? A. I don't know.

Q. Where was Lee Leong born?

A. Waikiki, Hawaiian Islands.

Q. How do you know that?

A. I was in the Sun Chin village at that time, and the parents brought the family back to the village, and his parents said so.

Q. Has applicant any brother or sisters?

A. One sister, Lee Moy; about 22 years now.

Q. Do you know names of applicant's parents?

A. Lee Sing also Lee Chuck Hing, and mother Lum She.

Q. What kind of feet has Lum She? A. Bound.

Q. Are you a friend of the family? That is, are you well acquainted with the parents of applicant?

A. Yes.

Q. Were you present on the occasion when applicant's parents arrived in the Sun Chin village from Hawaii?

A. Yes, I was present and went to his house.

Q. Do you mean that you went to their house immediately after their arrival?

A. Yes, on the same day.

Q. Did you see the family entering village?

A. Yes.

Q. Did you go out to see them?

A. I saw them a little distance away. [40]

Q. In what manner of conveyance were they brought to the village?

A. They all walked in the village, except Lee

(Testimony of Lee Sau.)

Leong's sister, who was in her mother's arms.

Q. From where did they walk?

A. From the sea beach.

Q. How far is the sea beach from the village?

A. Several hundred feet.

Q. How were they brought to the sea beach?

A. By a Chinese boat.

Q. Did they tell you at that time that they had just arrived from Hawaii? A. Yes.

Q. How old was applicant at that time?

A. Four years old.

Q. How old were you when you first came to Hawaii? A. 21 years old.

Q. Did you see applicant in the village very often after his arrival there? A. Yes, very often.

Q. Was it your custom to talk with him when you saw him?

A. Yes, and I would often teach him, and the children used to call him Hawaiian Baby.

Q. And when you were talking to him did you ever mention Hawaii to him? A. No.

Q. Did he ever tell you that he was born in Hawaii? A. Yes.

Q. Prior to your coming to Hawaii did Lee Leong ever tell you that he was born in Hawaii? A. Yes.

Q. How old was Lee Leong when he told you about his birth? A. 7 or 8 years old.

Q. Did he tell you that he was born in Hawaii more than once? A. Yes, plenty of times.

Q. Prior to your coming to Hawaii did applicant's parents tell you that Lee Leong was born in Hawaii?

(Testimony of Lee Sau.)

A. Yes.

Q. Was applicant present on those occasions?

A. I did not notice.

Q. When you were teaching applicant did you ever ask him anything about Hawaii?

A. No, I only asked him where he was born and he said Hawaii?

Q. How old was applicant when you came to Hawaii? A. About 8 years old.

Q. When you returned to Hawaii in 1908, did you recognize applicant as the same person you saw return from Hawaii? A. Yes.

(Records of this office show that Lee Sau, witness, was issued return permit on July 8, 1908, and that he returned from China on the "Korea" Aug. 8, 1908.)

Q. Did you see Lee Leong in China in 1907?

A. Yes.

Q. Did you discuss his Hawaiian birth at that time? A. Yes.

Q. What did he tell you?

A. He asked about the Hawaiian Islands were, and that he would like to return.

Q. Did he ask you anything about getting papers, or anything of that kind?

A. Yes, he asked me about people who were born in Hawaii but who did not have papers and I told him that if he was born he could return.

Q. Do you think you are able to identify Lee Leong now? A. Yes.

(Testimony of Lee Sau.)

Q. Were you in Hawaii when Lee Leong was born here? A. No.

Q. Then you don't know of your own knowledge whether Lee Leong was born here or not, do you?

A. I heard about it.

Q. But you don't know of your own knowledge where Lee Leong was born?

A. No, I don't know but his parents said so.

Q. How do you know but what Lee Leong was born in some distant village in China, and returned to Sun Chin?

A. I only know what his parents said.

Q. Have you anything further to say? A. No.

(Signed in Chinese.)

Subscribed and sworn to before me this 1st day of April, 1913.

(S.) MERLEN J. MOORE,

Immig. & Act. Chinese Inspector.

The foregoing testimony has been translated by me to affiant named therein and before signing he has acknowledged it to be correct.

(S.) CHUCK HOY,

Interpreter.

Witness Lee Sau taken to detention quarters and identifies applicant. [41]

Q. (To applicant.) Who is this person (indicating Lee Sau)? A. I don't know.

Q. Do you know his name? A. No.

Q. Did you ever see him before?

A. It seems to me that I saw him in the village, but I don't know.

[Testimony of Lee King.]

Witness LEE KING, sworn, testifies: C. R. D.
King, #7904; Verified Oct. 18, 1909.

Q. What are your names?

A. Lee King and Lee Young Hoo.

Q. How old are you? A. 34 years old.

Q. Where were you born?

A. Sun Chin village, China.

Q. When did you first come to Hawaii?

A. When I was 12 years old.

Q. Have you been to China since?

A. Yes, once, 1909.

Q. How long did you remain in China on that trip?

A. Returned after a year.

Q. Did you stay in the Sun Chun village all the
time you were in China? A. Most of the time.

Q. Are you married?

A. Yes; to Lum Shee; 25; now loosed feet, form-
erly bound; no children.

Q. What is your occupation?

A. Tailor, in my brother's store, On Tai Lee store,
Honolulu.

Q. How long have you been in that business?

A. About 10 years.

Q. What is your object in coming here to-day?

A. Come to be a witness for Lee Leong.

Q. How old is he?

A. About 24 or 25 years old.

Q. Are you acquainted with his parents?

A. Yes.

Q. Do you know their names?

(Testimony of Lee King.)

A. Lee Sing, Lee Chuck Hing, and mother, Lum Shee.

Q. What kind of feet has Lum Shee?

A. Bound feet.

Q. Do you remember the year when you came to Hawaii?

A. It was 22 years ago. I was a small boy then, and I don't remember the year.

Q. Has Lee Leong any brothers or sisters?

A. One sister, Lee Moy, about 21 or 22.

Q. Where was Lee Leong born?

A. Waikiki, Honolulu.

Q. How do you know that?

A. I first saw him when I first arrived in Honolulu, when I visited his parents; he was about 3 or 4 years old at that time.

Q. What was his father doing at Waikiki?

A. Planting bananas.

Q. How many children did Lum Shee have at that time? A. A son and a daughter.

Q. Where did you live when you came to Hawaii?

A. Maunakea Street, Honolulu.

Q. What was the occasion of your visit to Lee Sing at Waikiki?

A. He is my family relation, and from the same village.

Q. Is there a blood relation?

A. No; perhaps so a way back.

Q. Was it customary for you to visit Lee Sing and Lum Shee at Waikiki, or did you visit *one* them but this once?

(Testimony of Lee King.)

A. Once in a while, whenever I had spare time.

Q. How long did you continue to make these visits?

A. About a year.

Q. And why did you not continue to visit Lee Sing?

A. They went to China.

Q. How old was Lee Moy, or Lee Leong's sister when you came to Hawaii?

A. One or two years old.

Q. Was she old enough to play about the yard, or was she in her mother's arms? ..

A. She was just begining to walk.

Q. Then she was about 2 years old?

A. Yes, 2 years old.

Q. You say you came to Hawaii 22 years ago; now, if Lee Leong was 3 or 4 years old, then, and his sister Lee Moy was 2 years old, and they remained in Hawaii about one year after you came, it would appear that Lee Leong was about 4 or 5 years old when he was taken to China?

A. Yes, Lee Leong was about 4 years old when he was taken to China, and his sister about 2 years old.

[42]

Q. But you said they were that old when you first came here?

A. I didn't say exactly; about that age.

Q. Whereabouts at Waikiki did Lee Sing live?

A. Kong Sing banana plantation.

Q. You came here 22 years ago, and saw Lee Leong at Waikiki, and for that reason you are of the opinion that he was born in Hawaii?

A. Yes, his parents were here, and sister.

(Testimony of Lee King.)

Q. Did you know these people in China?

A. Yes.

Q. Did you ever see them in the Sun Chin village?

A. I may have, but I don't know, I was so young.

Q. Did you ever see Lee Sing or Lum Shee prior to your coming to Hawaii, in China?

A. I don't remember.

Q. They claim to have come from your village?

A. Yes.

Q. Then how do you know but what these children were born in China, and later brought to Hawaii by their parents?

A. Lee Sing said they were born here.

Q. When did he tell you that?

A. When I first arrived here.

Q. Do you know why Lee Sing went to China?

A. No.

Q. Has he ever returned? A. No.

Q. Did you see Lee Sing in China in 1909?

A. Yes.

Q. What was he doing at that time?

A. He had a store of the name of Ming Lee and sometimes he would go out in the field and plant vegetables.

Q. Where did his family live?

A. Lived back of the store.

Q. How many children has Lum Shee, Lee Sing's wife, at the present time? A. Two.

Q. Did you see Lee Moy in China in 1909?

A. Yes, I saw Lum Shee and Lee Moy.

Q. Did you see applicant Lee Leong? A. Yes.

(Testimony of Lee King.)

Q. Did you talk to him? A. Yes.

Q. Did he ever tell you that he was born in Hawaii?

A. Yes.

Q. What did he tell you?

A. He asked me how the Islands were, and that he would like to return.

Q. Did he ask you how he could return?

A. He said he was going to write to his cousin, Lee Yet, to get a paper for his return.

Q. Did you recognize Lee Leong as being the same boy you saw on your first arrival in Hawaii, the boy you saw at Waikiki, 22 years ago?

A. No, I did not recognize him, but I recognized his father, and talked to his father, and his father asked me if I recognized his son, who was born at Waikiki.

Q. And when his father asked you if you recognized his son, what did you tell him?

A. "Is that so? I do not recognize him; he has grown."

Q. Then all you have is the father's word that Lee Leong is the boy? A. Yes.

Q. If you were unable to identify him in 1909, as the boy you saw at Waikiki, 22 years ago, how do you expect to identify him to-day?

A. It was so long a time I could not.

Q. If you could not identify him, how do you expect to do so now?

A. His father told me in 1909.

Q. As I understand you, you are in a position to-day to identify Lee Leong as the boy you saw in China in 1909? A. Yes.

(Testimony of Lee King.)

Q. But you are not in position to say that Lee Leong is the same person you saw at Waikiki 22 years ago?

A. I can say that his parents said so.

Q. When was the first time Lee Leong said anything to you about being born in Hawaii?

A. In 1909.

Q. You had never spoken to *you* before that, had you? A. No. [43]

Q. Are you quite sure that the first time you ever saw Lee Leong was not in China in 1909?

A. No; I am sure I saw him at Waikiki.

Q. What was Lee Leong doing in China in 1909?

A. In his father's store.

Q. Was he married then?

A. He was married a *short after* I arrived in the Sun Chin village.

Q. Do you know when you arrived here?

A. 9th or 10th month, Chinese.

Q. How old was applicant in 1909?

A. 21 or 22.

Q. Have you anything further to say?

A. No.

(Signed in Chinese.)

(Witness taken to detention quarters; identification mutual.)

Subscribed and sworn to before me this 1st day of April, 1913.

(S.) MERLEN J. MOORE,
Immig. & Act. Chinese Inspector.

The foregoing testimony has been translated by me

(Testimony of Lee Yau.)

to affiant named therein, and before signing he has acknowledged it to be correct.

(S.) CHUCK HOY,
Interpreter.

[Testimony of Lee Yau.]

Witness LEE YAU, sworn, testifies: C. R. 7592, not verified.

Q. What are your names?

A. Lee Yau and Lee Arn Hoo.

Q. How old are you? A. 34.

Q. Where were you born? A. Sun Chin, China.

Q. When did you first come to Hawaii?

A. About 18 years ago.

Q. Have you been back since?

A. Yes, once; in 1910, and returned in 1911.

(Applicant was admitted here as a domiciled merchant S/S "Manchuria" April 28, 1911.)

Q. Are you married?

A. Yes, to Wong Shee; 21; bound feet; living in China.

Q. Have you any children?

A. One daughter; don't know her name; born after I left China.

Q. What is your occupation?

A. Member and work for L. Kwai Yau Co., Honolulu.

Q. What is your object in coming here to-day?

A. Witness for Lee Leong.

Q. Do you know his parents? A. Yes.

Q. Give me their names.

A. Lee Sing and Lee Chuck Hing, and mother, Lum Shee.

(Testimony of Lee Yau.)

Q. What kind of feet has she? A. Bound feet.

Q. Has Lee Leong brothers or sisters?

A. One sister; don't know her name.

Q. How old is she? A. I don't know.

Q. Is she older than Lee Leong?

A. No, younger.

Q. Where was Lee Leong born?

A. His mother said that he was born in Hawaiian Islands.

Q. Did you ever see either of Lee Leong's parents in Hawaii? A. No.

Q. Did you ever see Lee Leong in Hawaii?

A. No, but in China.

Q. When did you see Lee Leong in China?

A. I saw Lee Leong before I came to Hawaii, and I saw him again when I was in China in 1910.

Q. How old were you when you first came to Hawaii? A. When I was about 15 or 16.

Q. And you say you saw applicant in China before you came here? A. Yes.

Q. How old was applicant when you came to Hawaii? A. 4 or 5 years old.

Q. Were you acquainted with applicant's parents in China, before you came here? A. Yes.

Q. Did you visit their house in China?

A. Yes, often.

Q. Did you visit applicant's parents in China from your early boyhood? A. Yes. [44]

Q. From the time you can remember, from the time you were a small boy? A. Yes.

Q. Then, do I understand that from your earliest

(Testimony of Lee Yau.)

recollection you remember Lee Sing and Lum Shee living in the Sun Chin village? A. Yes.

Q. Did you know Lee Leong's parents before Lee Leong was born? A. No.

Q. How old is Lee Leong?

A. 24 or 25 years old.

Q. Then he is younger than you are? A. Yes.

Q. You claim to be 34 years old, and you must have been nine or ten years old when Lee Leong was born?

A. Yes.

Q. And you claim to have known applicant's parents in China from your early boyhood?

A. I know that he was born in the Hawaiian Islands.

Q. Where were you living when Lee Leong was born? A. Sun Chin.

Q. How could Lee Leong be born in Hawaii when his parents were in China?

A. At that time they all went to China.

Q. How old was Lee Leong when his parents took him to China? A. About 4 years old.

Q. How long did you know Lee Leong and his parents in China before you came to Hawaii?

A. 4 or 5 years.

Q. Then applicant must have been 8 or 9 years old when you came to Hawaii? A. Yes.

Q. If you were in China when Lee Leong was born, how do you know that he was born in Hawaii?

A. The applicant's mother told me so.

Q. Did Lee Leong ever tell you that he was born in Hawaii?

(Testimony of Lee Yau.)

A. Not at that time, but he was talking to me in 1910.

Q. What did Lee Leong tell you in 1910?

A. I went to visit his store; and he said that he was born in Hawaiian Islands, and that he would like to return.

Q. Did he ask you how he could return?

A. He just said that he was born here.

Q. Did Lee Leong, prior to your coming to Hawaii ever tell you that he was born here? A. No.

Q. Did you ever talk to Lee Leong prior to your coming here? A. Yes.

Q. Did his parents ever tell you that he was born here? A. Yes.

Q. When? A. When I was in China last.

Q. Did they ever tell you before you came to Hawaii? A. No.

Q. Then, I understand you, the first time you ever heard of Lee Leong being born in Hawaii was in 1910, when you visited the Sun Chin village?

A. Not only that time, but before.

Q. If his parents told you, and if Lee Leong never told you, how did you hear it?

A. I heard that his parents said so.

Q. The truth of it is that you never gave the subject of the birth of Lee Leong any thought until you were in China in 1910?

A. Yes, his parents told me before I came to Hawaii

Q. You just stated that his parents never told you before you came to Hawaii; now you say they did?

(Testimony of Lee Yau.)

A. Yes, they told me.

Q. Did the applicant ever tell you before you came here? A. No.

Q. Do you remember the arrival of the family of Lee Sing in the Sun Chin village?

A. No; I never saw them until a few days after they came.

Q. How do you know that they came from Hawaii?

A. Lee Leong's parents said so.

Q. How is it that you seem to be so well acquainted with Lee Leong and his parents, and you do not know anything about his sister?

A. I never talked to her.

Q. Are you in a position to say *that* your own knowledge that Lee Leong was born in Hawaii?

A. No, it all depends on his parents.

Q. Then, if his parents had told you that Lee Leong was born in Mexico or some other place you would believe that he was? A. Yes. [45]

Q. Did you recognize Lee Leong in 1910 as the boy you used to know in Sun Chin, before you came to Hawaii? A. No, I did not recognize him.

Q. Did his parents tell you that he was the boy?

A. Yes.

Q. If you were not able to recognize him in 1910 as the boy you saw in the Sun Chin village prior to your coming to Hawaii, how do you expect to recognize him now?

A. I believe that his parents said.

Q. Have you anything further to say? A. No.

(Signed in Chinese.)

(Testimony of Lee Leong.)

Subscribed and sworn to before me this 1st day of April, 1913.

(S.) MERLEN J. MOORE,
Immig. & Chinese Inspector.

The foregoing testimony has been translated by me to affiant named therein, and before signing he has acknowledged it to be correct.

(S.) CHUCK HOY,
Interpreter.

Witness Lee Lau taken to the detention quarters; witness points out applicant from a group of Chinese, and applicant calls witness by name, and says that he saw witness in China several years ago.

[Testimony of Lee Leong (Recalled).]

Applicant recalled, sworn, testifies:

Q. What are your names?

A. Lee Leong and Lee Ying Hoo.

Q. Whereabouts in the Sun Chin village have you been living? A. Center of the village.

Q. How far from your father's store?

A. Right in the store, back of the store.

Q. How old were you when you first learned that you were born in Hawaii?

A. When I was 12 or 13 years old.

Q. Prior to that time was it customary for you to talk with different people about being born in Hawaii? A. No.

Q. Do you know a man by the name of Lee Sau?

A. No.

Q. Do you know a man by the name of Lee Gun Hoo? A. No.

(Testimony of Lee Leong.)

Q. Is the Sun Chin village near the sea?

A. Yes.

Q. How far away from the sea?

A. One or two hundred feet.

Q. Have you anything further to say? A. No.

Q. Have you understood the Interpreter?

A. Yes.

(Signed in Chinese.)

[Decision of Inspector, Dated April 2, 1913.]

UNITED STATES IMMIGRATION SERVICE,
PORT OF HONOLULU, T. H.

April 2nd, 1913.

Case of Lee Leong:

After consideration of the record made in regard to new evidence set forth in the brief on appeal I see no reason to change the opinion already formed.

(S.) RICHARD L. HALSEY,

Inspector in Charge. [46]

**[Petitioner's Exhibit "B"—Certificate of Birth of
Lee Leong.]**

TERRITORY OF HAWAII.

OFFICE OF THE SECRETARY.

CERTIFICATE OF HAWAIIAN BIRTH.

TO ALL TO WHOM THESE PRESENTS SHALL
COME, GREETING:

THIS IS TO CERTIFY, that Lee Yet, now residing at Honolulu, Oahu, T. H., whose signature is attached hereto, has filed application No. 841 for a certificate of Hawaiian Birth for LEE LEONG.

And that it appears from said application, its ac-

companying affidavits, and the evidence of witnesses examined that said LEE LEONG was born in the Hawaiian Islands on the 21st day of January, A. D. 1888, and that the photograph attached to this certificate is a good likeness of him at this time.

IN TESTIMONY WHEREOF, the Secretary of the Territory of Hawaii has hereunto subscribed his name and caused the great seal of said Territory to be affixed.

Done in Honolulu, this 21st day of November, A. D. 1912.

[Seal] (Signed) E. A. MOTT-SMITH,
Secretary of Hawaii.

(Photograph.) [47]

*In the District Court of the United States in and for
the District and Territory of Hawaii.*

In the Matter of the Petition of LEE LEONG for a
Writ of Habeas Corpus.

**Order [Directing Issuance of Writ of Habeas
Corpus, etc.].**

Upon motion of Geo. S. Curry and Andrews & Quarles, counsel for the petitioner above named, and upon having heard read the within petition for a writ of habeas corpus, and upon the showing made it appears to me that a writ of habeas corpus should issue, as prayed for in the within petition, and I do hereby order and direct that a writ of habeas corpus be forthwith issued out of this Court directing and commanding Richard L. Halsey, United States Immigration Inspector in charge at the Port of Honolulu, Terri-

tory of Hawaii, to have and produce the body of the within named petitioner before this Court on Wednesday, the 21st day of May, A. D. 1913, at the hour of 10 o'clock in the forenoon of said day, or as soon thereafter as counsel may be heard.

And I do hereby further order and direct that a copy of this petition and writ be forthwith served upon Robert W. Breckons, United States District Attorney for the District and Territory of Hawaii, or his Deputy.

(Sgd.) CHAS. F. CLEMONS,
Judge of the District Court of the United States in
and for the District and Territory of Hawaii.

Dated Honolulu, Hawaii, May 16th, 1913. [48]

**[Writ of Habeas Corpus and Marshal's Return
Thereon.]**

The President of the United States of America to
Richard L. Halsey, Esquire, United States Im-
migration Inspector in Charge, at the Port of
Honolulu, Territory of Hawaii:

We command you that the body of LEE LEONG by you detained and imprisoned, as is charged, you have before our District Court of the United States in and for the District and Territory of Hawaii, on Wednesday, the 21 day of May, A. D. 1913, at the hour of 10 o'clock in the forenoon of said day, together with the cause of the detention of the said LEE LEONG, to then and there undergo and receive what our said Court shall consider concerning him in this behalf, and have you then and there this writ with your doings thereon, and you, EUGENE R.

HENDRY, United States Marshal in and for the District and Territory of Hawaii, or your deputy, are hereby directed and commanded to forthwith serve this writ.

Witness the Honorable SANFORD B. DOLE and CHARLES F. CLEMONS, Judges of the District Court of the United States in and for the District and Territory of Hawaii, this 16 day of May, A. D. 1913.

[Seal]

A. E. MURPHY,

Clerk of the District Court of the United States in
and for the District and Territory of Hawaii.

By (Sgd.) F. L. Davis,

Deputy U. S. Marshal's Office.

MARSHAL'S RETURN.

The within Petition, Order and Writ of Habeas Corpus was received on the 16th day of May, A. D. 1913, and returned as executed this 17th day of May, A. D. 1913, by hand upon Richard L. Halsey, U. S. Immigration Inspector for the Port of Honolulu and C. C. Bitting, Asst. U. S. District Attorney, by exhibiting to each of them the original Petition, Order and Writ of Habeas Corpus and handing to and leaving with each of them a certified copy of same.

E. R. HENDRY,

U. S. Marshal.

By (Sgd.) H. H. Holt,

Chief Office Deputy.

[Endorsed]: No. 57. (Title of Court and Cause.)
Petition Order and Writ. Filed May 16, 1913. A.
E. Murphy, Clerk. By (Sgd.) F. L. Davis, Deputy
Clerk. [49]

[Order Continuing Hearing on Return to Writ of Habeas Corpus to May 27, 1913, etc.]

From the Minutes of the United States District Court, Vol. 8, Page 519, Wednesday, May 21, 1913.

[Title of Court and Cause.]

On this day came the above petitioner in person and with his counsel, Messrs. George S. Curry and R. P. Quarles, and also came the respondent herein, Richard L. Halsey, in person and with Mr. C. C. Bitting, Assistant United States District Attorney, this being the return day herein. Thereupon, on motion of Mr. Bitting and consent of Mr. Curry and Mr. Quarles, it was by the Court ordered that this cause be continued to May 27th, 1913, at 9 o'clock A. M., for hearing on Return to Writ. It was also stipulated by counsel for the respective parties, that the production of the petitioner be waived at all times pending the final determination of this cause. [50]

[Return of Immigration Inspector to Writ of Habeas Corpus.]

In the United States District Court in and for the Territory of Hawaii.

In the Matter of the Application of LEE LEONG for a Writ of Habeas Corpus.

Return of Richard L. Halsey, United States Immigration Inspector in Charge at the Port of Honolulu, Territory of Hawaii, to the Writ of Habeas Corpus heretofore, on the 16th day of

May, A. D. 1913, issued by the Honorable CHARLES F. CLEMONS, One of the Judges of the Above-entitled Court.

And by way of return to the said order and writ herein issued, your respondent demurs to said petition, and for grounds of demurrer says:

First. That said petition does not state facts sufficient to entitle the petitioner to the relief in his said petition prayed for.

Second. That the said petition and the alleged facts therein stated do not show the citizenship, or right to citizenship, of the said LEE LEONG in the United States of America or and to the Territory of Hawaii within the jurisdiction of this Court. If the allegations thereof are true which respondent does not admit—that said petition shows upon its face that said petitioner was or is the son of Chinese parents among the class of excluded aliens denied entrance into the United States, and that if either the said petitioner or his parents were ever entitled to entrance into and residence in the United States, the same has long since been abandoned.

Third. And by way of further return, your respondent denies [51] that petitioner was born at Waikiki, in the city and county of Honolulu, on the Island of Oahu, in the Territory of Hawaii, on or about the time stated in paragraph one of his said petition, or at any other time at said place, and he further says that, while adhering to said denial, even if said petitioner was so born; by acts of his parents whatever, if any, citizenship either the parents of said petitioner or the petitioner himself might have

acquired in the then Kingdom of Hawaii, were surrendered, abrogated and entirely of naught, in so far as this proceeding is concerned.

Fourth. That said petition shows that since about the year 1892, petitioner himself has resided with his parents in a certain village in the petition named, and that said parents have neither claimed nor exercised since said time any right of citizenship, entrance or residence in either the Kingdom, Republic or Territory of Hawaii.

Fifth. As to paragraph three of said petition, your respondent neither admits nor denies the allegations thereof, and asks that the petitioner may be put upon his proof of the same.

Sixth. Respondent admits that upon the arrival at the Port of Honolulu aforesaid, and on or about the time stated, the petitioner was taken in charge by the immigration officers of the United States of America, and was afterwards conveyed to the United States Immigration Station; but denies that he is or was or ever has been unjustly or without warrant or authority of law, or by any other way, imprisoned and restrained of his liberty by your respondent; but admits his official position as stated in said paragraph; and that the said Richard L. Halsey, respondent herein, says,—neither asserting nor denying that said petitioner is a Chinese laborer,—that said petitioner from his own showing was not entitled to land in the United States, or in any port thereof. Furthermore, the respondent says that at the time mentioned in said petition, the said petitioner was given a fair, impartial and unrestricted hearing, to

determine whether or not [52] he was entitled to land at the Port of Honolulu, in the said United States of America, or at any other port of the said United States within the jurisdiction of this Court; and that the decision of said Inspector, your respondent herein, upon said hearing, together with the decision of the Secretary of Labor, is made a part of the Inspector's return herein; and that said decision, appearing among the exhibits of the Petitioner herein, will show that there was such a hearing as is contemplated by law, accorded the petitioner; and the said decision of the said Inspector was affirmed on the 12th day of May, A. D. 1913, by the Acting Secretary of Labor.

That all of the rest and other of the allegations and averments in said paragraph of said petition are merely conclusions of law.

Seventh. That the petitioner was accorded such a hearing as was fair and impartial, as will be shown by the exhibits attached to, and the allegations of the petitioner's complaint herein.

Eighth. That a full, true and complete hearing was allowed the said petitioner, as required by law; that after due consideration, it was determined by the authorities invested by law with such determination, that the said petitioner was not entitled to land within the said United States. That subsequent to such determination, and before final affirmation, upon the request of petitioner, and his attorney, the matter was reopened for further consideration and evidence submitted thereon; and that thereafter the judgment and determination of the Inspec-

tor in Charge was made and rendered; from which an appeal was taken, and which decision was sustained and affirmed by the Secretary of Labor, and the determination upon which appeal was and is by law final and conclusive.

That this Court, nor any Judge thereof, by reason of the premises, has a right or jurisdiction to inquire further into said proceeding. [53]

WHEREFORE, your respondent prays that the writ herein issued may be discharged, and the respondent may recover his costs herein.

(Sgd.) RICHARD L. HALSEY,

Inspector in Charge.

(Sgd.) C. C. BITTING,

Assistant U. S. Attorney for Respondent.

United States of America,
Territory of Hawaii,—ss.

Richard L. Halsey, being first duly sworn according to law, deposes and says that he is the Richard L. Halsey who has made the return to the writ of habeas corpus in the above-entitled cause; that he has read the said return, and knows the contents thereof, and that the facts therein stated are true.

(Sgd.) RICHARD L. HALSEY.

Subscribed and sworn to before me this 22d day of May, A. D. 1913.

[Seal]

(Sgd.) WM. L. ROSA,

Deputy Clerk United States District Court, Territory of Hawaii.

CABLEGRAM.

"VIA COMMERCIAL PACIFIC."

Received at 7:40 A. M. ART.

16 USG WASHINGTON DC 6

IMMIGRATION HONOLULU. May 12 1913

DEDICANT LEE LEONG

KEEFE

Bureau code, Bureau Circular No. 17, as amended March 18, 1912. DEDICANT—Acting Secretary has affirmed excluding decision board and directs deportation; or (in Chinese cases), Acting Secretary has affirmed your excluding decision case—

Attached to return by amendment June 14, 1913.

(Sgd.) C. F. C., Judge. [54]

[Endorsed]: No. 57. Title of Court and Cause. A. E. Murphy, Clerk. By (Sgd.) Wm. L. Rosa, Dep-Return of Richard L. Halsey. Filed May 22, 1913. uty. [55]

*In the District Court of the United States in and for
the District and Territory of Hawaii.*

In the Matter of the Petition of LEE LEONG, for
a Writ of Habeas Corpus.

Exceptions to Return and Motion to Discharge.

Comes now the petitioner, by his attorneys, George S. Curry, and Andrews & Quarles, and excepts to the return of the respondent, Richard L. Halsey, Inspector in Charge, and moves that the petitioner be ordered discharged from custody of said respondent, upon the grounds and for the reasons following, to wit:

The said return is insufficient as a whole, and does not state any cause for detention of the petitioner by the said respondent.

The first paragraph of said return purports to be a demurrer to the petition, and does not respond to the writ issued, and is improper and insufficient in that it attacks the petition which has become *functus*, the said petition, and its sufficiency having been passed on by one of the Judges of the above-entitled Court, held sufficient and the writ ordered issued, and the respondent cannot go back of said writ but must respond thereto, and said paragraph is a contempt of the order and authority of the said Judge and of the said Court.

The second paragraph of said return is, in effect, an attempt to demur in part to the said petition, without admitting the facts therein stated, but attempting to deny some of the said facts, and an attempt to plead matter in avoidance of the facts [56] stated in the said petition, improper, inadmissible and in contempt of Court.

The third paragraph of said return is insufficient and improper in that it is an attempt to deny in part allegations in said *functus* petition, and an attempt, in part, to plead new matter in avoidance of the allegations of said *functus* petition, and does not respond to the commands of said writ by stating the cause of detention of the prisoner together with the proceedings wherein he is detained, as required by law.

The fourth paragraph of the said return is improper and insufficient in that it does not state the cause of detention of the petitioner by respondent,

but attempts to allege new matter in avoidance which is not pertinent, and is argumentative in that it attempts to show why a native-born citizen of Hawaii should be held to have lost his citizenship.

The fifth paragraph of said return does not state any cause for the detention of the petitioner by the respondent, is improper and insufficient in that it is in the nature of an answer to a bill in equity, neither affirming nor denying, but calling for proof by petitioner of the allegations of paragraph three of his said *functus* petition; and is not part of the return to said writ recognized by law.

The sixth paragraph of said return does not state any cause of detention of the petitioner by said respondent, and shows that the petitioner is not detained by the said respondent; and, further, said paragraph is argumentative and in the nature of a demurrer to the said *functus* petition and questions the sufficiency of the same, and questions the discretion of the Judge of this court issuing the writ herein and treating the action of the said Judge with contempt, and does not respond to the writ as required by law. [57]

The seventh paragraph of said return does not respond to the said writ, does not show any cause for detaining the prisoner by the respondent, states mere conclusions, questions the sufficiency of the petition after it has been passed upon and held sufficient, and is wholly insufficient, in law.

The eighth paragraph of the said return is wholly insufficient in that it states mere conclusions, and shows that the petitioner is entitled to his discharge;

does not state any legal or other cause for the detention of the petitioner by the respondent, and does not respond to the writ by showing the proceedings under which the petitioner is detained by the respondent.

The said return, as a whole, is contradictory and insufficient, states conclusions of law, and does not show any cause, legal or otherwise, for detaining the petitioner by the respondent, and does not show the proceedings under which the petitioner is detained, if detained at all.

WHEREFORE, petitioner prays that this his exceptions to the said return of the respondent herein be sustained, and that he be discharged from custody.

(Sgd.) LEE LEONG,
Petitioner.

(Sgd.) GEO. S. CURRY and
ANDREWS & QUARLES,
His Attorneys.

(Sgd.) GEO. S. CURRY and
ANDREWS & QUARLES,
Attorneys for Petitioner.

May 26, 1913.

[Endorsed]: No. 57. (Title of Court and Cause.)
Exceptions to Return and Motion to Discharge.
Filed at 11:50 o'clock A. M. May 26, 1913. A. E.
Murphy, Clerk. By (Sgd.) Wm. L. Rosa, Deputy
Clerk. [58]

[Order Continuing Hearing on Return to Writ of Habeas Corpus, to May 28, 1913.]

From the Minutes of the United States District Court, Vol. 8, Page 524, Tuesday, May 27th, 1913.

[Title of Court and Cause.]

On this day came the above petitioner in person and with his counsel, Mr. George S. Curry and Mr. L. Andrews, and also came Mr. C. C. Bitting, Assistant United States District Attorney, on behalf of the respondent herein, Richard L. Halsey, and this cause was called for hearing on the Return to the Writ herein. Thereupon, on motion of Mr. Bitting and consent of Mr. Curry and Mr. Andrews, it was by the Court ordered that this cause be continued to May 28, 1913, at 2 o'clock P. M., for further hearing on said Return to the Writ herein. [59]

In the United States District Court for the Territory of Hawaii.

In the Matter of the Petition of LEE LEONG, for a Writ of Habeas Corpus.

Motion [to Strike Exceptions to Return and Motion to Discharge].

Comes now Richard L. Halsey, Inspector in Charge, and moves the Court that the alleged pleading heretofore on the 26th day of May, A. D. 1913, filed in this court and cause, and entitled, "EXCEPTIONS TO RETURN AND MOTION TO DISCHARGE," be stricken from the files for the following reasons:

1. That the same is scandalous.
2. That the same is unintelligible.
3. That the same attempts to pass judgment upon matters which are exclusively within the cognizance of the Court and which matters only upon the proper presentation the Court has right to determine.

RICHARD L. HALSEY,

Inspector in Charge.

By (Sgd.) C. C. BITTING,

Assistant United States Attorney.

Dated this 27th day of May, A. D. 1913.

[Endorsed]: No. 57. (Title of Court and Cause.)
Motion. Filed May 27, 1913. A. E. Murphy, Clerk.
By (Sgd.) F. L. Davis, Deputy Clerk. [60]

**[Proceedings on Hearing on Return to Writ—May
28, 1913.]**

From the Minutes of the United States District
Court, Vol. 8, Page 525, Wednesday, May 28th,
1913.

[Title of Court and Cause.]

On this day came Mr. George S. Curry and Mr. R. P. Quarles, counsel for the above petitioner, and also came Mr. C. C. Bitting, Assistant United States District Attorney, on behalf of the respondent herein, Richard L. Halsey, and this cause was called for hearing on the Return to the Writ herein. Thereupon argument having been had by respective counsel and the time for adjournment having arrived, it was by the Court ordered that this cause be continued

to May 29, 1913, at 2 o'clock P. M., for further hearing on said return. [61]

[Proceedings on Hearing on Return to Writ—May 29, 1913.]

From the Minutes of the United States District Court, Vol. 8, Page 527, Thursday, May 29, 1913.

[Title of Court and Cause.]

On this day came the above petitioner, in person and with his counsel, Mr. George S. Curry, Mr. L. Andrews and Mr. R. P. Quarles, and also came Mr. Richard L. Halsey, the respondent herein in person and with Mr. C. C. Bitting, Assistant United States District Attorney, and this cause was called for further hearing. Thereupon due argument having been had herein, it was by the Court ordered that this cause be continued to May 31, 1913, at 9 o'clock A. M., for further hearing. [62]

[Proceedings on Hearing on Return to Writ—May 31, 1913.]

From the Minutes of the United States District Court, Vol. 8, Page 528, Saturday, May 31, 1913.

[Title of Court and Cause.]

On this day came the above petitioner in person and with his counsel, Mr. George S. Curry and Mr. L. Andrews, and also came Mr. C. C. Bitting, Assistant United States District Attorney on behalf of the respondent herein, Richard L. Halsey, and this cause was called for further hearing. Thereupon and

after further argument had been had on said petition, it was by the Court ordered that this case be continued to June 2, 1913, at 9 o'clock A. M., for decision.
[63]

Order Denying Petition, Discharging Writ and Continuance for Hearing on Motion for the Fixing of Bail Pending Appeal.

From the Minutes of the United States District Court, Vol. 8, Page 530, Monday, June 2, 1913.

[Title of Court and Cause.]

On this day came the above petitioner in person and with his counsel, Mr. George S. Curry, Mr. L. Andrews and Mr. R. P. Quarles, and also came the respondent herein, Richard L. Halsey, in person and with Mr. C. C. Bitting, Assistant United States District Attorney, and this cause was called for further hearing. Thereupon further argument having been had herein by respective counsel, the Court rendered and filed its decision, discharging the said Writ and remanding the petitioner to the custody of the respondent. Thereafter, upon motion of Mr. Curry for the fixing of bail herein pending appeal, argument was had thereon and the said case was continued to June 3, 1913, at 9:30 o'clock A. M., for further hearing on said motion. [64]

**Order of Continuance for Hearing on Motion for Bail
Pending Appeal.**

From the Minutes of the United States District
Court, Vol. 8, Page 531, Tuesday, June 3, 1913.

[Title of Court and Cause.]

On this day came Mr. George S. Curry and Mr. R. P. Quarles, counsel for the above petitioner, and also came Mr. C. C. Bitting, Assistant United States District Attorney, on behalf of the respondent herein, Richard L. Halsey, and this cause was called for hearing on motion for bail pending appeal. Thereupon it was by the Court ordered that this cause be continued to June 4, 1913, at 1:30 o'clock P. M., for hearing on said motion. [65]

**Order of Continuance for Hearing on Motion for Bail
Pending Appeal.**

From the Minutes of the United States District
Court, Vol. 8, Page 533, Wednesday, June 4,
1913.

[Title of Court and Cause.]

The within cause having been called on this day for further hearing on motion for bail pending appeal and none of counsel for the respective parties being present, it was by the Court ordered that this cause be continued to June 7, 1913, at 10 o'clock A. M., for further hearing on said motion. [66]

*In the United States District Court in and for the
Territory of Hawaii.*

In the Matter of the Application of LEE LEONG,
for a Writ of Habeas Corpus.

Answer to Return [to Writ of Habeas Corpus].

Comes now the petitioner, and, for answer to the second paragraph of the return of the respondent herein, he denies that the petition of the petitioner herein shows upon its face that this petitioner was, or is, the son of Chinese parents among the class of excluded aliens denied entrance into the United States; and he denies that petitioner has long since, or at all, abandoned the right to entrance into, or residence in, the United States to which he was entitled, and is entitled, by reason of being born in Hawaii.

Answering the third paragraph of said return, the petitioner denies that by any act or acts of his parents, or either of them whatever, or that by any act of his own whatever, at any time or place whatever, that the right which he acquired by reason of his birth in the Kingdom of Hawaii, was ever at any time to any extent, or in any manner whatsoever, surrendered or abrogated, or became or was or is "entirely of naught," in so far as this proceeding is concerned, or otherwise, or at all.

Answering the fifth paragraph of said return, this petitioner says that his said Hawaiian birth certificate, mentioned in his petition herein and in the exhibit to said petition attached, was at the time of filing his said petition and the issuance of the writ

of habeas corpus herein, and is now, in the possession of the respondent, and this petitioner calls upon the said respondent to [67] bring into this court at the hearing herein the said Hawaiian birth certificate.

The petitioner says that the said Hawaiian birth certificate was duly and regularly issued to the petitioner by the Secretary of the Territory of Hawaii under the great seal of the Territory of Hawaii in accordance with the provisions of the Act of the legislature of the Territory of Hawaii entitled, "AN ACT TO PROVIDE FOR THE ISSUANCE OF CERTIFICATES OF HAWAIIAN BIRTH," approved April 17, A. D. 1913, and is in full force and effect, has never been canceled, set aside nor impeached, but is entitled to full faith and credit. That at the said hearing the identity of the petitioner as the holder of, and person named in, the said Hawaiian birth certificate was not questioned nor denied. The said Hawaiian birth certificate and the uncontradicted evidence of numerous witnesses who testified as to the identity of the petitioner and to his birth in Hawaii were not considered by the Immigration officers at said hearing and was arbitrarily ignored.

Answering the sixth paragraph of the said return, the petitioner denies that this petitioner, from his own showing, was not entitled to land in the United States, or in any port thereof. He denies that at the time mentioned in said petition the said petitioner was given a fair hearing or an impartial hearing or an unrestricted hearing to determine whether or not he was entitled to land at the Port of Honolulu, in

the said United States of America, or at any other port of the said United States, within the jurisdiction of this Court. He denies that the said decision of said Inspector, the respondent herein, upon said hearing will show that there was such a hearing as is contemplated by law, and denies that a fair hearing was given to the petitioner by the said respondent, and denies that the petitioner was given such a hearing as is contemplated by law by the respondent.

Answering the seventh paragraph of said return, the petitioner denies that he was accorded by the respondent such a [68] hearing as was fair or impartial, and denies that the petition of the petitioner and the exhibits attached thereto, do, or any or either of the same will or does, show that petitioner was accorded a fair or impartial hearing by the respondent.

Answering the eighth paragraph of the said return, the petitioner denies that a full, true or complete hearing was allowed the said petitioner by the respondent, as required by law; he denies that after due consideration, or any consideration whatever, by respondent of the evidence introduced at such hearing by the petitioner it was determined by the authorities invested by law with such determination, or by the said respondent, that the said petitioner was not entitled to land within the United States, and denies that any consideration whatever was given such evidence by the respondent, and denies that such determination was based upon any consideration of such evidence, and denies that such determination was otherwise than arbitrary and contrary to all of the

evidence introduced at the said hearing by the petitioner, and denies that such consideration and conclusion so reached by the respondent was based upon any consideration whatever of the evidence introduced at said hearing. He denies that after the matter was reopened for further consideration and after evidence was submitted thereon that the judgment and determination of the Inspector in Charge was thereafter made and rendered.

Having answered and traversed the return of the respondent to the petition of the petitioner herein, your petitioner, as in the said petition, prays the order and judgment of this Court that he be discharged from the custody of the respondent and given his liberty.

(Sgd.) Signed in Chinese (LEE LEONG),
Petitioner.

ANDREWS & QUARLES,
GEO. A. DAVIS,

Attorneys for Petitioner. [69]

United States of America,
Territory of Hawaii,—ss.

Lee Leong, being first duly sworn, according to law, deposes and says: That he is the Lee Leong who, as petitioner, has made and signed the above and foregoing answer to the return of the respondent in the above-entitled cause; that he has heard read and interpreted from English into Chinese the said answer and knows the contents thereof, and that the denials and facts therein stated are true.

(Sgd.) In Chinese (LEE LEONG).

Subscribed and sworn to before me this 5th day of June, A. D. 1913.

[Seal] (Sgd.) J. S. WALKER,
Notary Public 1st Judicial Circuit, Territory of Hawaii.

[Endorsed]: No. 57. (Title of Court and Cause.)
Answer to Return. Filed Jun. 5, 1913. A. E. Murphy, Clerk. By (Sgd.) F. L. Davis, Deputy.
[70]

**Order of Continuance for Hearing on Motion for
Bail Pending Appeal.**

From the Minutes of the United States District Court, Vol. 8, Page 540, Saturday, June 7, 1913.

[Title of Court and Cause.]

On this day came Mr. George S. Curry and Mr. R. P. Quarles, counsel for the above petitioner, and also came Mr. C. C. Bitting, Assistant United States District Attorney, on behalf of the respondent, Richard L. Halsey, and this cause was called for further hearing in the matter of the motion for bail herein pending appeal. Thereupon the Court gave each side until June 12, 1913, within which to file their briefs on the weight to be given to Chinese Birth Certificates and ordered that this cause be continued to June 10, 1913, for hearing on motion for bail pending appeal. [71]

**Order Allowing Certain Amendments and Fixing
Bail Pending Appeal.**

From the Minutes of the United States District
Court, Vol. 8, Page 550, Saturday, June 14, 1913.

[Title of Court and Cause.]

On this day came the above petitioner, in person and with his counsel, Mr. George S. Curry and Mr. R. P. Quarles, and also came the respondent herein, Mr. Richard L. Halsey, in person and with Mr. C. C. Bitting, Assistant United States District Attorney, and this cause was called for further hearing on Motion for Bail. Thereupon, on motion of counsel for the petitioner, the Court allowed certain amendments to the petition, ordered that a copy of the decision of the Secretary of Labor be attached to said petition, and that pending appeal herein petitioner be enlarged on bond in the sum of \$2,000.00. [72]

[Respondent's Exhibit No. 1—Letters from Inspector Moore to Inspector in Charge at Honolulu.]

Port of Honolulu, T. H., April 2, 1913.

Inspector in Charge, U. S. Immigration Service,
Honolulu.

I have to transmit herewith additional testimony taken in the case of LEE LEONG, an alleged Hawaiian born Chinese.

Attorney for applicant has presented affidavits signed by LEE LUN, LEE YAU, and LEE SAU. In addition to taking statements from the foregoing witnesses, statements have been taken from LEE

KING and LEE YAU, alias Lee Arn Hoo. Five witnesses in all were presented.

Witness LEE LAU, alias LEE KOI YIP, tells a story of seeing applicant Lee Leong in the Sun Chin village in China when applicant was a small boy, 4 or 5 yrs old, and of applicant telling him of his birth in Hawaii. Later he admits that he never saw applicant until 1911 when he, witness, visited China, and that was the first time he ever heard that applicant was born in Hawaii. This witness identified applicant.

Witness LEE LUN, alias LEE BAK YIP, related a very similar story, as does witness Lee Lau, in that he saw the applicant in the Sun Chin village when he, applicant, was 4 or 5 yrs of age. This witness contradicts himself many times during the examination, and admits that he is now unable to identify applicant as the boy he knew in the village prior to his coming to Hawaii. All he knows, as he says, is what applicant's parents told him.

It would appear from the testimony of witness LEE SAU that he was well acquainted with applicant and applicant's family. He tells of visiting applicant's parents immediately after their arrival in China from Hawaii. He says that he was 21 yrs of age when he came to Hawaii, and that while he was in China he visited applicant's house often, and speaks of teaching the applicant. When this witness was taken to the detention shed he identified the applicant as Lee Leong but the applicant did not know his name, did not know who he was, and said that he may have seen him in the home village but he did not know.

Witness LEE KING claims to have arrived in Hawaii 22 years ago and to have visited applicant and his parents at Waikiki, Honolulu. He says that applicant was then 3 or 4 yrs old and that he was taken to China about one year after witness' arrival. This witness states that he was unable to identify applicant as the boy he saw at Waikiki when he was in China in 1909, but that applicant's parents said it was the same boy.

Witness LEE YAU, alias Lee Arn Hoo, gives very unsatisfactory testimony. There are numerous contradictions in his testimony, and is of such a nature that little dependency can be placed on it: He tells of being acquainted with applicant's parents in the Sun Chin village from his early boyhood, and of visiting applicant's parents from the time he was a small boy. In the next breath he declares that he never knew applicant's parents until after applicant was born. This witness claims to be 9 or 10 yrs older than applicant.

Care was taken in the examination of these witnesses that they understood every question. Applicant's alleged cousin, Lee Yet, was asked by the examining inspector if all his witnesses were present and he said that they were, and that he did not know of any others.

All papers are handed you herewith.

(Sgd.) MERLEN J. MOORE,

Immi. & Act. Chinese Inspector. [73]

Port of Honolulu, T. H., March 17, 1913.

Inspector in Charge, U. S. Immigration Service,
Honolulu, T. H.

I have to hand you herewith my report and all papers in the case of LEE LEONG, an alleged Hawaiian born Chinese, who arrived at this port from China by the SS. "Siberia" March 10th, 1913. Applicant claims to have been born at Waikiki, Honolulu, and to have been taken to China at the early age of four years by his parents and younger sister. He is now 25 years of age, and has a wife and child living in the Sun Chin village, China. Five witnesses are produced who testify regarding the birth of applicant, as follows: Lee Yet, Lee Wo, Lee Keau, Lee Chew, and Siu Sam. Applicant has no relatives in Hawaii other than witness Lee Yet, who claims that his grandfather was brother to applicant's grandfather.

Applicant states that his father has no brothers or sisters and never had any; witness LEE YET states that applicant's father has one brother, and gives his name as LEE MING. Lee Yet states that Lee Ming is applicant's father's younger brother and that he saw him in China in 1900 because he was in Dow Mon at that time. Applicant never heard of a man by the name of Lee Ming.

The records of this office shows that witness Lee Yet was issued laborers' return permit #26,666 on Nov. 25, 1910, and that Lee Wo was issued laborer's return permit #26,667 on Nov. 25, 1910. The records of this office also show that Lee Yet and Lee Wo departed for China on the same steamer, Dec. 19, 1910. Witness Lee Wo was admitted on his return here on Nov. 20, 1911, and Lee Yet was admitted on his return Sept. 1st, 1911. It will be seen that wit-

nesses Lee Yet and Lee Wo were in China at the same time. Witness Lee Yet says that he was in the Sun Chin village 7 months, while witness Lee Wo says he was in this village 8 or 9 months. Applicant states that these witnesses visited his house in China frequently on these visits and that they saw his wife and [74] child on those visits. Witness Lee Yet does not know that applicant has a child; witness Lee Wo says applicant's wife has a child, a son, an infant when he was in China. It will be noted that applicant gives the date of the birth of this son as "6th month, 24th day ST. 3," or July 18, 1911, and that Lee Wo used to accompany Lee Yet on his visits to applicant's house.

Witness Lee Keau claims to have known applicant since boyhood, but when taken to the detention room applicant fails to identify him, though he identified applicant. Lee Keau was issued laborers' return permit #25,694 on Sept. 29, 1910, and departed for China Oct. 10, 1910, and was landed here on his return Aug. 8, 1911. Applicant's testimony, when recalled, relative to witness Lee Keau is very unsatisfactory.

It will be noted that witnesses Lee Yet, Lee Wo, and Lee Keau, claim to have come to Hawaii at about the same time, or when applicant was 7 or 8 years of age, applicant living at that time in China. Neither witness Lee Chew or Siu Sam can identify applicant. There is no record of Applicant's departure.

As a result of the investigation in this case the examining inspector is of the opinion that the case is fraudulent, and recommendation is made that he be

denied a landing and deported to China.

All papers herewith.

(Sgd.) MERLEN J. MOORE,

Imm. & Act. Chinese Inspector.

[Endorsed]: No. 57. (Title of Court and Cause.)
Respondent's Exhibit #1. Filed Jun. 14, 1913. A.
E. Murphy, Clerk. By (Sgd.) Wm. L. Rosa, Deputy
Clerk. [75]

**[Respondent's Exhibit No. 2—Letter, Dated April
18, 1913, from Inspector to Secretary of Commerce
and Labor.]**

April 18, 1913.

No. 2954/C.

The Honorable, The Secretary of Commerce and
Labor, Washington, D. C. (Thru Bureau of Immigration.)

I have the honor to inclose the record on appeal in
the case of Lee Leong, an alleged Hawaiian born
Chinese who arrived at this port on the S/S. "Siberia,"
March 10, 1913. The names of the principals
are as follows:

Applicant—Lee Leong, *alias* Lee Ing Hoo.

Witness —Lee Yet, *alias* Lee Kau Hoo.

“ —Lee Wo, *alias* Lee Too Hoo.

“ —Siu Sam, *alias* Siu Shee.

“ —Lee Keau (Kow), *alias* Lee Look Hoo.

“ —Lee Chew.

“ —Lee Lau, *alias* Lee Koi Yip.

“ —Lee Lun, *alias* Lee Bak Yip.

- “ —Lee Sau, *alias* Lee Gun Hoo.
“ —Lee King, *alias* Lee Yong Hoo.
“ —Lee Yau, *alias* Lee Arn Hoo.

The applicant was denied a landing on March 17, 1913, and appeal taken on the 18th ult. A brief was filed by Attorney George S. Curry, in view of which a further hearing was given, and a supplementary brief filed. The briefs attacked the integrity of the examining officers, consequently were refused and returned to Mr. Curry. He was given an opportunity to file an additional brief, confining himself to the evidence of the record, which he said he would not do, and failed to do. Copies were made of the briefs, and the correspondence in regard thereto is forwarded to the Commissioner-General of Immigration.

In view of the record, it is recommended that the appeal be dismissed. The Hawaiian birth certificate presented by the applicant (Exhibit “A”), is inclosed together with two communications, by the examining inspector, giving a general synopsis of the case. I would ask that the Hawaiian birth certificate be returned when it has served its purpose. [76]

The next available sailings of the line involved are scheduled for May 1st and 9th.

RLH/D.

Inspector in Charge.

(Incls.)

Exact copy as signed by Richard L. Halsey.
Mailed Apr. 18, 1913. By Richard L. Halsey.

[Endorsed]: No. 57. (Title of Court and Cause.)
Respondent's Exhibit #2. Filed Jun. 14, 1913. A.
E. Murphy, Clerk. By (Sgd.) F. L. Davis, Deputy
Clerk. [77]

*In the District Court of the United States in and for
the District and Territory of Hawaii.*

In the Matter of the Petition of LEE LEONG for a
Writ of Habeas Corpus.

Judgment.

At the regular April, A. D. 1913, term of the District Court of the United States in and for the District and Territory of Hawaii, held in the courtroom of said court, in Honolulu, City and County of Honolulu, in the Territory of Hawaii and District aforesaid, on Saturday, the 14th day of June, A. D. 1913, the above-entitled cause having heretofore been heard on the pleadings and arguments by counsel for the respective parties, and the evidence adduced before the Court, and due deliberation had thereon, the Court finds that the writ of habeas corpus issued herein should be discharged, and the petitioner remanded to the custody of the respondent herein Richard L. Halsey, United States Immigration Inspector in Charge, subject to the taking of an appeal:

NOW, THEREFORE, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the writ of habeas corpus issued herein by, and the same is hereby discharged, and that the above-named petitioner Lee Leong be, and he is hereby remanded to the custody of the said respondent subject to the taking of an appeal, and subject to exceptions by the said petitioner.

And the Court being advised that the above-entitled cause will be removed to the Circuit Court of Appeals

for the Ninth Circuit of the United States in the City and County of San Francisco, in the State of California, by proper proceedings to be had in that behalf. [78]

IT IS HEREBY FURTHER ORDERED, ADJUDGED AND DECREED that the above-named petitioner, LEE LEONG, be released upon giving his recognizance with surety, in the sum and amount of TWO THOUSAND DOLLARS (\$2,000.00), to answer the judgment of the Appellate Court, and that upon giving such recognizance the said petitioner, LEE LEONG, be released from custody.

GIVEN, MADE, and DATED, at Honolulu, City and County of Honolulu, Territory and District of Hawaii, this 14th day of June, A. D. 1913.

(Sgd.) CHAS. F. CLEMONS,
Judge of Said Court.

[Endorsed]: No. 57. (Title of Court and Cause.) Judgment entered in J. D. Book 2, at page 410. Filed Jun. 14, 1913. A. E. Murphy, Clerk. By (Sgd.) F. L. Davis, Deputy. [79]

#57.

*In the District Court of the United States in and for
the Territory of Hawaii.*

Before the Honorable CHAS. F. CLEMONS, Judge
of said Court.

In the Matter of the Application of LEE LEONG
for Writ of Habeas Corpus.

APPEARANCES:

For Petitioner, GEO. S. CURRY, ESQ., and LOR-
RIN ANDREWS, ESQ., and R. P. QUARLES,
ESQ., of the Firm of ANDREWS & QUAR-
LES;

For Respondent, C. C. BITTING, ESQ., Asst. U. S.
District Attorney.

[**Testimony and Proceedings Had in District Court.**]

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#57.

*In the District Court of the United States in and for
the Territory of Hawaii.*

Before the Honorable CHAS. F. CLEMONS, Judge
of said Court.

In the Matter of the Application of LEE LEONG
for Writ of Habeas Corpus.

APPEARANCES:

For Petitioner, GEO. S. CURRY, Esq., and LOR-
RIN ANDREWS, Esq., and R. P. QUARLES,
Esq., of the firm of Andrews & Quarles.

For Respondent, C. C. BITTING, Esq., Asst. U. S.
District Attorney.

Saturday, June 14, 1913.

The COURT.—I called the parties here to get this matter straightened out so that we may have the record more clear. We'll hear the case of Lee Leong which we will assume has been called. At the bottom of page 3, for instance, Mr. Bitting, in your Return, the decision of the Secretary of Labor is not attached.

Mr. BITTING.—I will ask permission of your Honor to attach the decision of the Secretary of Labor.

The COURT.—The permission is granted and the amendment made.

Mr. QUARLES.—The petitioner excepts.

The COURT.—Exception noted.

Mr. BITTING.—If your Honor please, at this present time I'd like to attach a copy of the Return.

(Testimony of Richard L. Halsey.)

I think Mr. Halsey should swear to this Petition as amended.

The COURT.—Mr. Halsey, this return as amended changing the last [81] three lines of page 3 and reading, “together with the decision of the Secretary of Labor,” as amended by the addition, you swear to that as true? The same is true, so help you God?

Mr. HALSEY.—Yes.

The COURT.—If the record doesn't show it will show that the respondent admits that the copy attached to the petition, the copy of the photograph, certainly is a copy and that the original photograph does represent the petitioner; that is, the identity of the petitioner is established.

[Testimony of Richard L. Halsey.]

Direct Examination of RICHARD L. HALSEY, called by the Court; sworn.

The COURT.—Mr. Halsey, the question arises whether or not this certificate of Hawaiian birth, a copy of which is annexed to the petition in the matter of Lee Leong, was actually considered by you in your decision? A. It was.

Q. Also, in regard to the oral evidence?

A. The whole record in the case was considered by me in arriving at my decision.

Cross-examination.

Mr. QUARLES.—Mr. Halsey, who was the Inspector that took the evidence in the case?

A. Mr. Moore.

Q. Now, isn't it a fact, Mr. Halsey, that Mr. Moore made a report to you and that report was considered

(Testimony of Richard L. Halsey.)

by you? A. You have the full record of the case.

Q. Didn't Mr. Moore make a report to you in writing as to the effect of the evidence and his conclusions?

Mr. BITTING.—I object to that as not being proper cross-examination or the subject of proper inquiry.

The COURT.—I allow the question.

Mr. BITTING.—We except to the ruling of the Court.

A. The memorandum, the Inspector made a memorandum on the case and I made my decision on the record.

Mr. QUARLES.—Now, Mr. Halsey, in your return you have stated that a copy of the proceedings is attached to the petition in this case.

A. What's that?

Q. In your return you have stated that a copy of the proceedings [82] was attached to the petition of the petitioner in this case. A. Yes.

Q. Will you point out in that exhibit that report or memorandum of Mr. Moore?

A. The memorandum is not a part of the case; not more than a memorandum made in an office.

Q. Wasn't that memorandum sent to the Commissioner? A. Not as a part of the record.

Q. Sent separate? It was sent to the Commissioner of Labor?

Mr. BITTING.—I object, if your Honor please. It isn't any part of the cross-examination.

The COURT.—Overruled. Exception taken and noted.

(Testimony of Richard L. Halsey.)

A. I sent a letter of transmission with the record in the case.

Q. And with this memorandum that Mr. Moore made to you? A. Yes.

Q. Now, why isn't that memorandum in the record?

A. Because it is not part of the record, and the Department states that a memorandum is not a part of the record of evidence.

Q. Where is that memorandum?

A. I haven't got it with me.

Q. You have it in the office? A. Yes.

Q. I ask you to produce it in this Court and everything else connected with this case that has not been produced.

Mr. BITTING.—We object to that.

A. I won't offer that certificate of Hawaiian birth. I don't feel that it is incumbent upon me to make that statement. You will find that the people who made the affidavits are witnesses in the case. I went into this record with exceeding care and spent much time upon it and it seems to me that these trivialities, that I should not be subjected—

The COURT.—Mr. Halsey, let me ask you just what this memorandum is.

A. The memorandum is simply a statement that a certain witness said so and so and thus and so. [83] There might be an inconsistency so and so. It's just a memorandum as to the testimony in the case.

Q. Is it in the nature of a brief on behalf of the Government pointing out to you or determining for

(Testimony of Richard L. Halsey.)

you inconsistencies which you may then take the record and see if you find and if you so find—

A. It's simply stating some things. A brief statement about the witnesses in the case and their testimony. And so far as my reasons are concerned, there are reasons which I had for denying the application which are not referred to in that memorandum. There are reasons which are justified which are not referred to at all in this memorandum.

Mr. QUARLES.—Now, Mr. Halsey, you sent with the record which is now in this case, this memorandum of Mr. Moore?

A. Yes, sir.

Mr. BITTING.—I object to the question, if your Honor please.

The COURT.—Overruled.

Mr. BITTING.—We except to the ruling of the Court.

The COURT.—Exception noted.

Mr. QUARLES.—Now, Mr. Halsey, isn't it a fact that you sent with the record to the Commissioner of Immigration and Labor, a memorandum made by Mr. Merland J. Moore as Inspector to you, and other documents, correspondence, bearing upon the question as to whether or not the petitioner should be permitted a landing in Hawaii.

Mr. BITTING.—Object to the question as improper.

The COURT.—Objection overruled.

Mr. BITTING.—Exception noted.

A. My recollection—

(Testimony of Richard L. Halsey.)

Mr. QUARLES.—And pertaining to the subject on inquiry?

A. Yes, I sent that memorandum along to the Secretary with my letter of transmission of the case.

Q. What else did you send with the record which is not attached to the petition here?

A. I think my letter of transmission of which the memorandum was practically made a part and the [84] record you have in the case was all I sent to the Secretary.

Q. Did you send to him an Hawaiian birth certificate?

A. Yes, I sent that because that's a part of the record.

Q. Where is that?

A. That Hawaiian birth certificate is in the Immigration Office, returned from Washington.

Mr. QUARLES.—Now, if your Honor please, we ask that an order be made directing the respondent to bring into this Court the memorandum, the report which Merland J. Moore made to him, the Hawaiian birth certificate introduced at the hearing, and all other documents in his possession which were sent to the Secretary of Commerce and Labor.

Mr. HALSEY.—I wish, if the Court will pardon me. The presentation in open court of a memorandum like that and the statement of all reasons in open court for a judgment, would lay the way open for unscrupulous persons in other cases to so plan and purpose as to meet those facts or statement which might show clearly that the case was fraudulent and

(Testimony of Richard L. Halsey.)

so there are administrative reasons why such a matter should not be presented.

Mr. QUARLES.—Or, in other words, the petitioner whose liability, whose constitutional rights are at stake is to be kept out of the country, denied admission upon a record a portion of which is secret. I ask that everything that Mr. Halsey says from that chair, be put into the record.

Mr. HALSEY.—The memorandum is not in the nature of evidence. The memorandum is simply a comment on the evidence.

Q. And in the nature of the brief for you?

A. In the nature of a memorandum.

Mr. BITTING.—A resume?

A. Yes, a resume. That's all there is to it. Nothing to do with the record.

The COURT.—How long would it take to get it up here?

Mr. BITTING.—I object to that being produced now, if your Honor please.

Mr. HALSEY.—The Department does not consider the memorandum [85] the expression by an Inspector on the testimony, as a part of the record in the case. I make that statement advisedly.

Mr. CURRY.—Right on that point, why did you send it to the Department if they do not consider it.

A. It is a part of my letter of transmission. They considered the record.

Mr. QUARLES.—You considered it yourself?

A. I considered the record.

Q. And this memorandum?

(Testimony of Richard L. Halsey.)

A. My determination is made on the record.

Q. Did you consider it? Answer the question, please. Did you read it? A. Yes, I read it.

Q. And examined portions of the evidence in connection with it, didn't you?

A. I went through the evidence myself.

Q. Didn't you do it in connection with this memorandum or report by Mr. Moore?

A. Not particularly.

Q. And wasn't it a statement of a finding of the facts in the case, purporting to set forth the facts shown by the evidence?

A. It was a statement in regard to each witness in the case.

Q. And the facts shown by their evidence. Now, if the Court please, we insist—

The COURT.—We will continue this matter until quarter past eleven. I will ask Mr. Halsey to bring the memorandum here at that time so as to save time.

Recess.

The COURT.—I will overrule Mr. Bitting's objection.

Mr. BITTING.—We except.

The COURT.—The exception is noted.

This is the memorandum, Mr. Halsey?

A. Yes, sir.

The COURT.—This will be admitted in evidence.

[86]

Cross-examination by Respondent.

Mr. BITTING.—Q. Mr. Halsey, was that evidence taken at the rehearing also included or taken into

(Testimony of Richard L. Halsey.)

consideration when the hearing was opened up, reopened?

A. All evidence. This is all the record. In fact, I heard a great deal of testimony myself and saw the witnesses.

Mr. QUARLES.—The first report of the Inspector, Mr. Merland J. Moore is dated the 17th of March, 1913. It was handed to you that day, was it, Mr. Halsey? A. I presume so.

Q. Well, don't you know whether it was?

A. I take it from the date of it—

Q. That's the date you made the order refusing a landing to the petitioner?

A. On that date, if I had the papers before me—

Q. What's your answer?

A. The record ought to show if that's the date. Yes, sir, that was the date that I made my decision, my first decision.

Q. Do you remember what time in the day you made that decision?

A. I am not so positive about that.

Q. Mr. Halsey, you say that as Inspector in Charge you are a very busy man, have a great many cases to pass on?

A. Hundreds of them. I sometimes go to work very early in the morning.

Q. Sometimes pass on a great number the same day?

A. Not a great number; that's a little strong statement.

Q. Now, isn't it your custom and habit, Mr. Halsey,

(Testimony of Richard L. Halsey.)

when the report of one of the Inspectors who has made the examination is handed to you that you make the order then and there on the report of the Inspector? A. No, sir.

Q. You're not in the habit of doing that?

A. I consider the testimony.

Q. You're not in the habit of considering it on these reports? [87]

A. I decide on the record.

Q. Will you answer my question?

A. I'm not in the habit of deciding where I'm not familiar.

Q. Don't you as a rule, and isn't it your habit and custom, on a report of this kind showing that he's not entitled to land that you then and there make the order? A. No, sir, I don't.

Q. You don't do that in any case.

A. They're cases in which I am familiar, like in this case, where I have seen the testimony.

Q. Did you hear it in this case?

A. Yes, sir, I heard a portion in this case.

Q. Which ones? A. I don't remember.

Q. How long was this examination? Do you remember that?

A. Yes, this examination was quite extensive and exhaustive.

Q. Was you attending to it or to other matters at that time?

A. I was attending to other matters and also I heard some of the testimony in this case.

Q. This report shows that other records not in the

(Testimony of Richard L. Halsey.)

evidence in this case furnished to you and attached as exhibit A, a copy of which is attached as exhibit A were considered. For instance, Permit 26,667?

A. What's that?

Q. This shows that the permit of return issued to Lee Yip, No. 26,667, on November 25, 1910, was considered by the Inspector. That is not a part of the evidence in this case furnished by you to the petitioner, is it? These different records here and certificates referred to in the report of Merland J. Moore, Inspector, where are they?

A. This is a certificate of residence; I suppose the certificate of residence is in his own possession.

Q. Where is the record and data from which he made this report? A. Those are in the office.

Q. Were those records sent to the Secretary of Commerce and Labor?

A. Oh, no, those are never sent. [88]

Q. But this report of Mr. Merland J. Moore was?

A. A copy of that was sent in my letter of transmission.

Q. Now, did you send anything with that letter of transmission besides these reports made by Mr. Merland J. Moore, Inspector, and the evidence of the witnesses?

A. I sent the Hawaiian birth certificate. That I regard as part of the record.

Q. Did you send anything with it?

A. That's all, to my memory, I sent to the Secretary of Labor.

(Testimony of Richard L. Halsey.)

Q. Have you a copy of that letter of transmission with you?

A. I think there is a copy of the letter of transmission there.

Q. Have you a copy in the courtroom?

A. I think so.

Q. Has Mr. Bitting a copy of that?

A. I think so.

Mr. QUARLES.—Well, ask that he produce that.

Mr. BITTING.—I object to that on the same grounds.

Q. Do you have any objection to stating what was in that letter of transmission? Was it just an ordinary letter, formal letter of transmission?

A. Formal letter of transmission. That's my memory of it, that's what I usually send along.

Mr. BITTING.—I want to make the further objection, if your Honor please, as far as this letter is concerned, that it would show a communication of another matter. I haven't any objection in the world that the portion referring to the Lee Leong matter be read into the record.

The COURT.—I will read this much into the record: "No. 2954/c, April 18, 1913. The Honorable, the Secretary of Commerce and Labor, Washington, D. C., Through Bureau of Immigration. I have the honor to inclose the record on appeal in the case of Lee Leong an alleged Hawaiian born Chinese, who arrived at this port on the S. S. "Siberia" March 10, 1913. The names of the principals are as follows: Applicant, Lee Leong, *alias* Lee Ing Hoo; wit-

(Testimony of Richard L. Halsey.)

ness, Lee Yet, *alias* Lee Kau Hoo; witness, Lee Wo, *alias* Lee Too Hoo; witness, [89] Siu Sam, *alias* Siu Shee; witness, Lee Keau (Kow), *alias* Lee Hook Hoo; witness, Lee Chew; witness, Lee Lau, *alias* Lee Koi Yip; witness, Lee Lun, *alias* Lee Bak Yip; witness, Lee Sau *alias* Lee Gun Hoo; witness, Lee King, *alias* Lee Yong Hoo; witness Lee Yau, *alias* Lee Arn Hoo. The applicant was denied a landing on March 17, 1913, and appeal taken on the 18th." Here follows the matter which Mr. Halsey says is a confidential communication.

Mr. QUARLES.—It can't be confidential if it relates to this case.

The COURT.—It doesn't relate to the merits of the case in any way; it relates to the briefs that's all.

Mr. QUARLES.—If it relates to this case we're entitled to the whole of it.

The COURT.—Then come eight lines and a half relative to the briefs without stating the merits of the briefs, then follows this paragraph: "In view of the record, it is recommended that the appeal be dismissed. The Hawaiian birth certificate presented by the applicant (*Exhibit* '''), is inclosed together with two communications, by the examining inspector, giving a general synopsis of the case. I would ask that the Hawaiian birth certificate be returned when it has served its purpose. The next available sailings of the line involved are scheduled for May 1st and 9th. Inspector in Charge. RLH/D. incls.

Mr. QUARLES.—And the Court refuses my re-

(Testimony of Richard L. Halsey.)

quest that the whole communication go in?

The COURT.—I think it will all have to go in, Mr. Halsey.

Mr. BITTING.—We except to the ruling of the Court.

Mr. QUARLES.—Mr. Halsey, did you, on the 17th day of March, read the records referring to the return permits issued to Lee Yet, Lee Wo—

A. I don't think I did.

Q. And the other witnesses referred to in the record of Merland J. Moore, Inspector?

A. The records and reference to the records like that and to the certificate of residence— I [90] didn't see the certificate of residence. It's referred to there as being handed back to the man.

Q. Did you see the evidence and the record in regard to these returned laborers' permits mentioned in this report of Mr. Merland J. Moore, inspector? Did you read them?

A. No, I don't think I read them.

Q. Then Mr. Moore considered some evidence which you did not consider, isn't that true?

A. He may have read them but I can't say positively whether he did or not.

The COURT.—You just testified that they're merely used for identification.

A. That is all, to show that a man is in China.

Q. They're not used for the purpose of impeaching any of the statements of any of the witnesses, are they? A. The witnesses—

Q. You can answer yes or no.

(Testimony of Richard L. Halsey.)

A. I don't think I did.

Q. Why were these records referred to at all?

A. If a man was in China in 1898 and came back in 1899, by looking at that record you find that it was so. You look at the testimony, you'll find that the man was there when he said he was.

Q. And if you don't find he's there you consider this witness as impeached, do you?

A. It would be a matter of investigation.

Q. Can't you say yes or no to that question?

A. If I had documentary evidence that a man is in China when he claimed he was here, of course, it would impeach the man.

Q. And you would disregard his evidence entirely?

A. I know the law about his being unable to occupy two places at the same time.

Q. Were these records shown to the petitioner or to his attorney at the time of the examination? [91]

A. I expect they may have had them before him.

Q. Answer the question.

A. That the Inspector can testify to; I don't know whether they were or not.

Q. Do you know whether they were or not?

A. I know they were before the Inspector.

Q. Do you know whether they were shown to the petitioner or shown to the witnesses and their attention called to them? A. No, I do not.

Q. Then you did base your conclusion to some extent on these reports of Mr. Merland J. Moore?

A. My conclusions were based upon the record of the case; that memorandum was simply used as a sort

(Testimony of Richard L. Halsey.)

of a guide, a synopsis of the case; and the second memorandum that was submitted there, I paid very little attention to. The evidence itself, on the second hearing—

Q. But on the first hearing instead of reading the evidence— A. I read the evidence.

Q. You took the report of Mr. Merland J. Moore and considered it? A. I read the evidence.

The COURT.—He didn't say so, Judge Quarles.

Q. Will you turn to the evidence in the case and point out any statement of any witness which shows that Lee Leong the petitioner was not born in Hawaii?

The WITNESS.—I object to do so.

The COURT.—I sustain the objection.

Mr. QUARLES.—We except to the ruling of the Court.

Mr. CURRY.—Point out the evidence that this man was in the class of persons included from admission to the United States.

Mr. BITTING.—Object to that.

The COURT.—I sustain Mr. Bitting's objection.

Mr. CURRY.—To which we except, may it please the Court.

The COURT.—Exception noted. [92]

Mr. CURRY.—Mr. Halsey, referring to the Exhibit A and which I show you, that was the decision and the entire decision which you entered in the case?

Mr. BITTING.—Object to that as the decision is the best evidence and speaks for itself.

(Testimony of Richard L. Halsey.)

The COURT.—I will allow that.

A. That's my decision.

The COURT.—Is that the only decision?

A. On the rehearing I reaffirmed that decision.

Mr. CURRY.—In that decision which you said constitutes the whole decision on file do you find any passing by you on this Hawaiian birth certificate?

A. That is in the record. My decision was on the record. That is part of the record.

Q. But you didn't make any reference to the Hawaiian birth certificate?

A. Now, you're trying to argue in regard to the decision and not in regard to the hearing and I object to answer your question.

The COURT.—The objection is sustained.

Mr. CURRY.—Exception noted.

The COURT.—I understood you, Mr. Halsey, that you did consider it; that the Hawaiian birth certificate was considered by you? A. Yes.

Mr. CURRY.—Do I understand that you passed upon the weight and sufficiency of this certificate?

Mr. BITTING.—Object to the question; it is not pertinent to this inquiry.

The COURT.—I understood Mr. Halsey to say that the Hawaiian birth certificate was before him and that he considered it as a part of the evidence.

A. Certainly.

Mr. CURRY.—I will withdraw the question. That's all for Mr. Halsey. We'll call Mr. Moore.

[Testimony of Merland J. Moore, for Petitioner.]

Direct Examination of MERLAND J. MOORE, a witness called for Petitioner and sworn.

Mr. QUARLES.—Q. What is your business, your official position, if any?

A. I'm Immigration and Acting Chinese Inspector in the U. S. Immigration Service.

Q. At what port? A. Honolulu.

Q. And who is the Inspector in Charge?

A. Richard L. Halsey.

Q. As such inspector did you make the examination in the case of Lee Leong, the Petitioner here?

A. I examined the witnesses presented in that case.

Q. And you made a report and signed it and delivered it to Mr. Halsey, did you, as to—

The COURT.—That matter is not disputed, Judge Quarles.

Mr. QUARLES.—You're the Merland J. Moore who signed this memorandum?

Mr. BITTING.—What's the object of this?

Mr. QUARLES.—I want to show how that examination was conducted by this witness.

Mr. BITTING.—Well, the evidence itself shows, your Honor.

Mr. QUARLES.—Are you the Merland J. Moore who signed this? A. That's my signature.

Q. This also? A. That's mine.

Q. Now, with this memoranda or record signed by you you delivered that with the evidence in the case to Mr. Halsey, did you?

(Testimony of Merland J. Moore.)

A. I passed those over to Mr. Halsey.

Q. And with it you delivered an order denying his admission? A. No, sir.

Q. Didn't you prepare that order? [94]

A. No.

Mr. BITTING.—I object to leading this witness any further that way.

The COURT.—Objection overruled.

Mr. QUARLES.—Do you know how long after you signed that report that Mr. Halsey signed the order? A. No, sir.

Q. Denying admission? A. No, sir.

Q. You don't know whether it was the same day or not, do you? A. No.

Q. Now, Mr. Moore, you examined certain records there in regard to return permits of the witnesses as a part of that case.

The COURT.—Calling your attention to the memoranda dated April 2.

A. Laborer return permits, I believe; looking up the departure and arrival of the witnesses.

Q. Now, did you show that to the witnesses at the time? A. Yes, sir.

Q. At the time they were testifying?

A. Yes, sir.

Q. Why doesn't the record show that?

A. Well, probably didn't come in in the question.

Q. You say the record in that case was shown to Lee Yet and read by him or read by you to him?

A. What I did say, I took the return permit and showed it to the witness and I showed his

(Testimony of Merland J. Moore.)

photograph attached to the return permit and I asked him if that was his photograph and he said it was and then I showed him the date of the certificate; then he told me he went back on that date. That was all I did.

Q. Well, I see in the record there are some of them stated, not verified. What does that mean?

The COURT.—Point one out, Mr. Quarles, that would be fairer and save time.

Mr. QUARLES.—For instance, the witness Lee Chew, the record [95] shows C. R. 4875, not verified.

A. That means that that witness has never made a trip to China since that certificate was issued to him.

Q. How do you know that fact?

A. Because every Chinese leaving this port must present, I won't say that he must have a certificate verified, before he is issued proper papers.

Q. Verified where?

A. At Washington. He presents that certificate at our office.

Q. That wasn't shown to the witness?

A. He had the certificate himself. That's his own certificate.

Q. In that case, "not verified," means you didn't show him any records in the office?

A. We had no reference.

Mr. CURRY.—You said the C. R. in the testimony and the return permit referred to in your memorandum were one and the same thing? A. No.

(Testimony of Merland J. Moore.)

Q. It's not?

A. I don't understand the question.

Q. You just testified that the C. R., C. R. No. 486 referred to the return permits which are mentioned in your communication to the Inspector in Charge?

A. I don't know exactly what you meant, but I presume that the reference is made to the same Chinese person to which this return permit is *issued presented* the certificate of residence.

Q. The C. R. there, where the C. R. appeared, refers to the laborer's certificate of residence. This Chinese laborer is supposed to have the return permit.

Mr. HALSEY.—Both of them are formal papers of identification.

Mr. CURRY.—Did you show the man the return permit and did you show him the record of his case when that return permit was issued?

A. It was all together.

Q. Is it not a fact that when a Chinese returns the return permit is forwarded to the Department at Washington?

A. You'd have to ask the Inspector-in-Charge about that. [96]

Mr. CURRY.—Will you admit that that's a fact?

Mr. HALSEY.—I think that's the practice now.

Mr. CURRY.—It will help things very much, Mr. Bitting, if you'll admit that the return permits that are issued to a man are sent to Washington.

Mr. BITTING.—If that's a fact we'll admit it.

Mr. CURRY.—What did you show, Mr. Moore,

(Testimony of Merland J. Moore.)

the record of their testimony that they gave at that time showing when they went to China, when they came here and when they went to China?

A. You want to know what I showed them?

The COURT.—What you showed to him.

Q. For instance, to the witness Lee Yet and to the witness Lee Wo. I had reference to their return permits. Did you show them the record of their statements upon the trial of their cases when they got a return permit?

A. I had the return permit before me and it was acknowledged by them that that was their paper, and in the case of faults, I just simply exhibited the whole record to them.

Q. What do you mean by “the old record”?

A. The whole record.

Q. Their testimony?

A. Their testimony. The witness’s testimony and the return permit in that particular case.

Q. Did you read the statements in that record to them or could they read it themselves.

The COURT.—There’s no question about that. How does that come in evidence here?

Mr. BITTING.—I don’t see how this kind of inquiry can possibly affect the matter.

Mr. CURRY.—I don’t think there are any more questions, Mr. Moore. (Last question read.)

The COURT.—You might answer that.

A. Those statements were signed by themselves or by their witnesses.

Q. They recognized their signatures? [97]

(Testimony of Merland J. Moore.)

A. They did. And the oath was signed beneath their signature. Did you read and interpret it to them on this hearing? You say this certificate was attached. Was it read and interpreted to them on this hearing.

* Mr. BITTING.—Object to that as immaterial and couldn't possibly have any bearing on the matter.

The COURT.—To save time I'll allow the question.

A. I gave them the purport of the testimony that they gave.

The COURT.—You showed them the papers?

A. I showed them the papers and gave them an opportunity to explain it.

Mr. CURRY.—Then, Mr. Moore, the testimony which you got in this case which you handed to the Inspector in Charge, a copy of which is attached does not contain all the questions asked on this examination by you?

A. All questions and answers.

Q. Will you point out this testimony in the case of Lee Wo where you asked him about this return certificate.

Mr. BITTING.—I object to going into that; counsel has stopped once or twice.

The COURT.—I will allow it in this way, Does this record show the presentation to the witness of his Chinese certificate and the examination, if there were any, upon it?

A. Yes, sir, a complete record inasmuch as any questions and answers that may have been directed

(Testimony of Merland J. Moore.)

direct to the witness, as I considered a part of the record this was kind of a side issue I turned to the witness and in a general manner wanted to know certain things in particular. These little side questions—

Q. Does that refer, do you refer now to those numbers opposite the witness's name beginning his testimony for residence, C. R. presented?

A. Yes, when he presented the papers and when I got the papers from the vaults.

Q. That is for the identification of these witnesses? [98] A. Yes.

Mr. CURRY.—That's a certificate of residence, did you get that from the vault? A. I don't know.

Q. Isn't it a fact that he carried it on his person?

A. If he presented it he carried it. I am referring to return permits.

Q. There is no reference here to those?

A. No, I won't say that, I haven't read that.

The COURT.—That's all, I believe. It appears from the evidence and the record in the case that the Petitioner had a fair hearing.

Mr. QUARLES.—Before closing, your Honor, we make the offer and want the record to show it, of evidence showing that this Petitioner was born in Hawaii. We have a dozen witnesses here showing that fact.

The COURT.—The Court declines to hear the evidence.

Mr. QUARLES.—To which the Petitioner excepts.

The COURT.—Exception noted: on the ground that it is not within my jurisdiction, not within my power, not proper for me as will presently appear.

This is my decision: It appears from the evidence and the record in the case that the petitioner had a fair hearing within the contemplation of law, and the decisions of the Supreme Court of the United States. Whether or not the Inspector's decision was right I don't know that I have to say, but I am inclined to believe that especially after the rehearing of the case the evidence was such as would justify his decision. The finding is one I am sure that if it were a finding of a jury upon the same facts could not be set aside. The case is, I say, one of those characterized by Justice Holmes as a case of a judgment, erroneous though it may be, but nevertheless the judgment of an authority of competent jurisdiction exercising its powers fairly and without bias. The Writ is dismissed and the Petitioner is remanded.

Mr. CURRY.—We except to that decision and ask for a ruling on [99] the point made as to the Hawaiian birth certificate. That is, there are two grounds alleged in this decision, whether or not it was an unfair hearing and the other a question of law as to the Hawaiian birth certificate and we respectfully ask for a ruling of your Honor on the point of the Hawaiian birth certificate.

The COURT.—I think it's only right for me to pass on that. I intended to and intend to in a memorandum of opinion which I can't file now but I have under way. I propose to rule on that point right now. Counsel have asked for a specific ruling on

the point raised with regard to the certificate of Hawaiian birth. It appears that that certificate was given consideration by the Inspector. That I should think is sufficient so long as there is some evidence, as I find, to justify the Inspector's ruling. The law of Hawaii, assuming that it is the law in a case of this kind and governs the actions of a distinct department of the United States, makes the record only *prima facie* but not conclusive evidence, and whether there was sufficient evidence to overcome the *prima facie* presumption it seems to me is something for the Inspector himself to determine unless it appears very clear that there was no evidence to overcome that presumption. I cannot say under the record that there was not such evidence, but I am inclined to believe that the presumption was overcome. It must be remembered that while this record is given, or certificate of Hawaiian birth is to be given, full faith and credit,—we will assume for the purposes of the case, although I don't admit it to be law,—yet the full faith and credit to be given to this record and the amount of evidence necessary to refute the presumption of its being correct depends somewhat on the fact that this is not a certificate issued pursuant to a record made as *res gestae* or in the regular course of business, like a record of deaths, births, and marriages made upon the representation made by disinterested parties at the [100] time; for instance: a clergyman certifying to a marriage or physician certifying to a birth or death. It is a certificate made at an *ex parte* hearing, made in this case some twenty-five years after

the Petitioner was born. My views in the matter I hope to set forth in a memorandum of opinion.

Mr. CURRY.—From which decision we except and give notice of intention to appeal and move that the Petitioner be enlarged on bail.

The COURT.—We will fix the bail at \$2,000.00

Mr. BITTING.—We except to the ruling of the Court allowing bail.

The COURT.—Exception noted. [101]

[Certificate of Reporter to Testimony, etc.]

I hereby certify that the foregoing is a full, true, and correct transcript of my shorthand notes of the testimony in the above-entitled cause.

Honolulu, T. H., September 9, 1913.

O. P. SOARES,
Official Reporter.

[Endorsed]: No. 57. (Title of Court and Cause.)
Transcript of Evidence. Filed Sep. 10, 1913. A. E. Murphy, Clerk. By (Sgd.) F. L. Davis, Deputy Clerk. [102]

[Decision.]

*In the United States District Court for the Territory
of Hawaii.*

No. —.

In the Matter of the Application of LEE LEONG
for a Writ of Habeas Corpus. [103]

In the final decision herein, made orally at the conclusion of the hearing, I expressed the purpose to file a memorandum of my opinion in writing.

There is, however, need of adding little to what was then said, aside from the statement of the case which follows.

A writ of habeas corpus issued on the allegation of the petitioner Lee Leong's unlawful detention in the custody of the respondent, the immigration inspector in charge at the port of Honolulu, for the purpose of deportation, the petitioner being entitled to land as a citizen by virtue of birth in Hawaii on or about the 21st day of January, 1888, of parents then domiciled here and lawfully married, and he being now on his return to Hawaii after having at the age of four years been taken to China by his parents with whom he has since resided there. The petition for the writ alleged as the basis for the inspector's detention of the petitioner, a mere semblance of a hearing,—an unfair hearing,—in that no consideration was given by the immigration officers to a certificate issued by the Secretary of the Territory of Hawaii under the great seal of the Territory, dated the 21st day of November, 1912, to the effect that the petitioner was born in Hawaii on the 21st day of January, 1888, and in that no consideration was given to “the uncontradicted evidence of numerous witnesses who testified as to the identity of the petitioner [104] and to his birth in Hawaii.” The petition also showed an appeal to the Secretary of Commerce and Labor from the inspector's finding of want of birth in Hawaii, and an affirmance of the inspector's decision and order of deportation.

A return to the writ was sustained on exceptions, because, as it appeared to me, it showed that the re-

spondent held the petitioner by virtue of a determination made by competent authority and duly affirmed; and further because at that stage there was in the respondent's return no admission of the identity of the petitioner with the person named in the birth certificate. The Court took occasion, however, to criticise the prolix and repetitious character of both the return and the petition. It may be noted also that the exception to the return for its embodiment of a demurrer to the petition is well taken; for, the writ having issued, any attack on the sufficiency of the petition should have been made by motion to quash or vacate. 21 Cyc. 317; Church, Habeas Corpus, 2d ed., sec. 169. "The return should be responsive to the writ, and not to the petition upon which it is based." Church, Habeas Corpus, 2d ed., sec. 160.

Finally, on a traverse to the return, issues were raised as to the following facts:

1.—The petitioner's being of the excluded class of aliens;

2.—The abandonment or surrender of his right to enter or reside in the United States;

3.—The issuance of the Hawaiian birth certificate;
[105]

4.—The fairness and impartiality of the hearing;

5.—The consideration by the immigration officers of the birth certificate and of uncontradicted evidence in behalf of the petitioner;

6.—The rendition of a judgment and determination of the inspector after his admission of further evidence on reopening.

A hearing was then had in which it was shown that the inspector had given consideration to the birth certificate,—which would be presumed in any event (*Ex parte Wing You*, 190 Fed. 294, 297), unless it be for the issue made on that point under the pleadings. But of course the question of law still remained whether the consideration given was due consideration.

At the hearing the fact of the issuance of the certificate and the identity of the petitioner with the person whose photograph is annexed thereto, were admitted by the Government. It also appeared that the inspector had ample evidence to establish preliminarily that the petitioner was the son of Chinese parents of the excluded class.

The point of expatriation need not concern us. Even assuming that under the circumstances shown by the evidence the petitioner by remaining away for some years after having reached his majority, impliedly renounced his nationality and allegiance as an American citizen (if he was such), still as the determination of the inspector did not raise any question of expatriation,—did not rest upon any ground of expatriation, but rather on the failure to show birth in [106] Hawaii,—no such question was open here.

It also appeared that the petitioner on appeal had the benefit of the supplementary evidence adduced on rehearing and that although there was no other formal judgment than the original decision, still the memorandum of the inspector, “after consideration of the record I see no reason to change the opinion

already formed," reaffirms the former decision or adopts it by reference.

The fairness and impartiality of the hearing on the question of his birth in Hawaii, which includes the question of the consideration given the birth certificate, i. e., its due consideration as a matter of law, was, then, the only point which remained.

Forthwith I rendered an oral decision holding that the immigration officers had given a fair hearing within the contemplation of law; that the finding of the inspector was one as to which there might be difference of opinion, but which could not be set aside merely because wrong (*Chin Yow vs. United States*, 208 U. S. 8, 11-12, 13); also that the birth certificate had been given due consideration by the inspector; and I indicated that even if such certificate were to be given full faith and credit and could not be set aside until overcome by some evidence, yet it could be overcome by a smaller weight of evidence than a certificate based upon a record made pursuant to a *res gestae* report, or contemporaneous report made in the course of business—i. e., a certificate issued, as this was, not until 25 years after [107] the party's birth and upon an *ex parte* hearing then had, would, though *prima facie* evidence, still not be entitled as against other evidence to such weight as, e. g., a certificate based upon a report of birth, marriage or death made contemporaneously by an attending physician or clergyman.

The petitioner's essential point was that the certificate of birth was made *prima facie* evidence of the facts therein stated, by session laws of Hawaii,

1911, act 96, sec. 3, and must be given full faith and credit under Revised Statutes, sec. 906, in spite of which, as he contended, the immigration officers gave no consideration to this certificate and none to the petitioner's witnesses.

But *prima facie* evidence stands only until overcome by "controlling evidence or discrediting circumstances." *Kelley vs. Jackson*, 31 U. S. (6 Pet.) 622, 631-632. And the immigration officers were, in my opinion, at liberty to find from the evidence discrediting circumstances if nothing more.

Assuming the birth certificate to be entitled to credit as *prima facie* evidence,—though the view of this court seems to have been otherwise in the matter of *Su Yen Hoon*, 3 U. S. Dist. Ct. Haw. 606, 609, 610, applying a statutory provision similar to that now re-enacted in the session laws of 1911,—there was also before the immigration officers matters which they were at liberty in their province as weighers of evidence to regard as casting doubt upon the fact of birth. There was the discrediting circumstance [108] that the petitioner produced before the immigration officers ten witnesses besides himself, offering them as persons who had knowledge of facts which would establish his birth in Hawaii, but whose testimony shows an absence of such knowledge,—testimony, either the barest hearsay, or inconsistent and untrustworthy, or insufficient when pieced together to connect the immigrant with the person born in Hawaii, taken to China at four years of age and now returning. Hereinafter the words "the boy Lee Leong" will indicate the boy born in Hawaii as dis-

tinguished from the word "petitioner" which will indicate the petitioner holding the birth certificate on the claim of being the same Lee Leong.

The reports of immigration officer Moore (marked "U. S. Exhibit 1," introduced by petitioner on cross-examination of the inspector, being letters of March 17th and April 2d, 1913) point out this untrustworthiness in detail.

The witness Lee Yet, a relative of the petitioner (Petition, Exhibit "A"), and—not a negligible circumstance,—the man who applied for the birth certificate (see *Id.*, and see birth certificate, *Id.*) connected the boy Lee Leong with a person who had an uncle (father's brother) Lee Ming, and who had no child, but the petitioner says that his father had no brother, that he did not know any Lee Ming, and that he himself had a child (Petition, Exhibit "A"). Lee Yau, who claimed to have known the boy Lee Leong at least since the latter was 4 or 5 years old (*Id.*) and who saw him often and visited his house often until he was 8 or [109] 9 years old, and who saw the petitioner in 1910 some 13 years afterwards, could not identify the petitioner as the boy Lee Leong. Lee Sau, who claimed to be well acquainted with the boy Lee Leong and with his family and visited them immediately after their arrival in China (in 1892) and again in 1907, and used to teach him, was unknown to the petitioner either by face or name. Lee Lung, who knew the boy Lee Leong from the time of the latter's arrival in China, and who came to Hawaii when the boy Lee Leong was about 9 years old (1897) and was in China again in 1910 and staid

for 9 months in the village of Sun Chin, where the boy Lee Leong is alleged to have resided, was unable to identify the petitioner as the boy Lee Leong. Lee Lau, who testified to seeing the boy Lee Leong in China when the latter was 4 or 5 years old, and who lived in the same village of Sun Chin until 1900 (Petition, Exhibit "A"), i. e., until the boy Lee Leong was 12 years old, admitted that he never saw the petitioner until 1911 (Id.).

It was within the discretion of the immigration officers, who saw the witnesses and observed their demeanor when testifying, to give weight as a discrediting circumstance to the fact that none of the witnesses could identify the petitioner as the boy Lee Leong, although some of the witnesses had known him and his family very well for different periods of time, some short and others longer, and that the petitioner could not identify witnesses who knew the boy Lee Leong (e. g., Lee Keau and Lee Sau, and see Petition, Exhibit "A"; U. S. Exhibit 1, letter of April 2, 1913). [110]

When persons who ought to know, and whom the petitioner offers as witnesses who do know that petitioner is who he claims to be, prove not to know the petitioner to be the boy alleged to have been born in Hawaii and who at the age of 4 went to China and to whom the certificate is alleged to apply, that fact certainly may raise a question whether the petitioner, though identified (by admission of the Government) as the person whose photograph is annexed to the birth certificate, was really the person who was born in Hawaii and who went to China and

for whose birth the certificate is alleged to have issued. If the petitioner had relied only on the birth certificate and if this certificate must be given *prima facie* credit as evidence, then of course in the absence of other evidence, it alone would be sufficient to entitle him to land. But when he offers the certificate and in addition asserts that he was a boy who was born in Hawaii and who at the age of 4 went to Sun Chin village and lived there until the age of 25, and that the certificate applies to that boy, and when he produces witnesses who claim that they had an opportunity to know the boy Lee Leong and his family very intimately there in that small village continuously from 1 year to 8 years, or until the boy was 12 years old, but are shown by their own testimony not to have been able on return visits to China, and not now to be able here to identify the petitioner as that boy, and when the petitioner himself cannot identify some of these [111] witnesses, surely a doubt is thereby cast upon the fact of the petitioner's being the same person as the boy Lee Leong, and so a doubt also upon the certificate which he claimed to apply to that boy and to prove that boy's (and his own) birth in Hawaii. If the circumstances above set forth do not directly discredit the certificate itself, they indirectly do the same thing by raising a doubt as to the truth of the fact in issue, the petitioner's birth in Hawaii which the certificate is offered to prove.

Also, a minor circumstance may be noted in the discrepancy of one month between the date of birth as given in the certificate and as claimed by the peti-

tioner in his testimony.

There appear in the record two statements which may be termed "gratuitous" (or at least the second may), but which should have passing notice. First, in the report of officer Moore to the inspector (U. S. Exhibit 1, letter of March 17, 1913), it is stated that "there is no record of the departure of the applicant." This report was not regarded as a part of the record but as in the nature of a memorandum or brief on the case (Tr., pp. 4, 5, 6, 7) and it is not to be presumed that anything in it was considered as evidence either at the original hearing or on the appeal. Though, possibly, under the decision in *Tang Tun vs. Edsell*, 223 U. S. 673, 681, it may have been proper to have considered it in any event; the Court taking judicial notice that at the time of the alleged departure passenger lists were required to be filed with officers of the Hawaiian government before clearance of vessels. Penal Laws of Hawaii, 1897, sec. 1177, embracing [112] the law in force in 1892. No point, or objection, was made on account of this report by petitioner's counsel in argument at the hearing. Second, the inspector in his testimony at the hearing on traverse to the return, says, "You will find that the people who made the affidavits are witnesses in the case." This referred clearly enough to the fact that the witnesses who gave testimony before the Secretary of the Territory as a basis for the birth certificate, were witnesses at the hearings before the immigration officers; from which an inference might be justified that the weak testimony, the want of knowledge, of these witnesses here would

discredit the certificate founded on their testimony there. But it does not appear, and cannot be presumed that this stated fact was considered by the inspector in reaching his decision, or by the Secretary of Commerce and Labor on the appeal; it was entirely new matter, brought out for the first time at the hearing here. And no point, or objection, was there made on account of it by petitioner's counsel. These two items should not, therefore, be considered in determining the fairness of the proceedings before the immigration officers. They serve only to suggest the question whether, even in spite of any unfairness in the hearing before these officers, the petitioner would be found on a full and fair hearing to be entitled to land. See *Chin Yow v. United States*, 208 U. S. 8, 13.

The writ is discharged and the petitioner remanded to the custody of the respondent.

(Sgd.) CHAS. F. CLEMONS,

Judge United States District Court. [113]

[Endorsed]: No. 57. (Title of Court and Cause.)
Decision Denying Writ. Filed October 13, 1913. A.
E. Murphy, Clerk. By (Sgd.) F. L. Davis, Deputy
Clerk. [114]

*In the District Court of the United States in and for
the District and Territory of Hawaii.*

In the Matter of the Petition of LEE LEONG for
a Writ of Habeas Corpus.

Petition for Appeal.

To the Honorable CHARLES F. CLEMONS, Judge
of the Above-entitled Court:

Lee Leong, conceiving himself aggrieved by the order and judgment made and entered on the 14th day of June, A. D. 1913, in the above-entitled proceeding, does hereby appeal from the said order and judgment to the Circuit Court of Appeals for the Ninth Circuit, and files herewith his assignment of errors intended to be urged upon appeal, and he prays that his appeal may be allowed, and that a transcript of the record of all proceedings and papers upon which said order and judgment was made, duly authenticated, may be sent to the Circuit Court of Appeals for the Ninth Circuit of the United States.

Dated this 16th day of June, A. D. 1913.

LEE LEONG,

By (Sgd.) GEO. S. CURRY.

ANDREWS & QUARLES,

His Attorneys.

Received a copy of the above petition.

(Sgd.) C. C. BITTING,

Assistant United States Attorney,

United States District Attorney, District and Territory of Hawaii.

[Endorsed]: No. 57. (Title of Court and Cause.)
Petition for Appeal. Filed Jun. 16, 1913. A. E.
Murphy, Clerk. By (Sgd.) F. L. Davis, Deputy.
[115]

*In the District Court of the United States in and for
the District and Territory of Hawaii.*

In the Matter of the Petition of LEE LEONG for
a Writ of Habeas Corpus.

Order Allowing Appeal.

Upon the application of Lee Leong and upon the
motion of his attorneys Geo. S. Curry and Andrews
& Quarles:

IT IS HEREBY ORDERED that the petition for
appeal heretofore filed herein by the petitioner Lee
Leong be, and the same is hereby granted; and that
an appeal to the United States Circuit Court of Ap-
peals for the Ninth Circuit from the final order and
judgment heretofore, on the 14th day of June, A. D.
1913, filed and entered herein, be and the same is
hereby allowed, and that a transcript of the record
of all proceedings and papers upon which said final
order and judgment was made, duly certified and au-
thenticated, be transmitted, under the hand and seal
of the Clerk of this Court, to the United States Cir-
cuit Court of Appeals for the Ninth Circuit of the
United States, at San Francisco, in the State of Cali-
fornia.

Dated this 16th day of June, A. D. 1913.

(Sgd.) CHAS. F. CLEMONS,

Judge of the District Court of the United States in
and for the District and Territory of Hawaii.

Received a copy of the above order.

(Sgd.) C. C. BITTING,

Assistant United States Attorney, District and Ter-
ritory of Hawaii.

[Endorsed]: No. 57. Order Allowing Appeal.
Filed Jun. 16, 1913. A. E. Murphy, Clerk. By
(Sgd.) F. L. Davis, Deputy. [116]

*In the District Court of the United States in and for
the District and Territory of Hawaii.*

In the Matter of the Petition of LEE LEONG for
a Writ of Habeas Corpus.

Assignment of Errors.

And now comes Lee Leong, the above-named petitioner by his attorneys, Geo. S. Curry and Andrews & Quarles, and says that in the record and proceedings in the above-entitled matter there is manifest error and that the final record and judgment, made and entered in said matter on the 14th day of June, A. D. 1913, is erroneous and against the just rights of the said petitioner Lee Leong, in this, to wit:

First: The above-entitled court erred in refusing to sustain the exceptions of the petitioner to the return of the respondent, said return being insufficient in law, in that the said return did not show that the petitioner was held under any valid order or process,

and did not show that the petitioner was a Chinese laborer, or alien born, or within any of the classes of persons excluded from admission to the United States.

Second: The above-entitled court erred in refusing to grant the motion of the *petition* for his discharge upon the fact of the said return, the said return being insufficient for the reasons stated in the first assignment of error herein.

Third: The above-entitled court erred in ruling that there was evidence in the record attached to the petitioner's petition as Exhibit "A" sufficient to show that the petitioner was alien born and not born in the Hawaiian Islands.

Fourth: The above-entitled court erred in ruling that there [117] was evidence in said record attached to the petitioner's petition as Exhibit "A" sufficient to support the order made by the United States Immigration Inspector in Charge denying the petitioner admission to the United States and ordering his deportation; all of the evidence in the record shows and tends to show that the petitioner was born in the Hawaiian Islands, lived in the Hawaiian Islands until he was 4 years of age, when he was taken to China by his parents, and there being no evidence whatever in the record showing that the petitioner had voluntarily expatriated himself by forswearing allegiance to the United States or swearing allegiance to any foreign government whatever.

Fifth: The above-entitled court erred in ruling that there is or was evidence in the said record justifying the United States Immigration Inspector in

Charge in ignoring the Hawaiian Birth Certificate presented by the petitioner, a copy of which is attached to the petitioner's petition herein as Exhibit "B," there being no evidence whatever in said record impeaching the said Hawaiian Birth Certificate and no evidence whatever showing that the fact of Hawaiian Birth of the petitioner stated in said Hawaiian Birth Certificate was or is not true.

Sixth: The above-entitled Court erred in holding that the petitioner was given a full and fair hearing by the United States Immigration Inspector in Charge, in that the entire record shows that the Petitioner established by evidence the fact of his Hawaiian Birth, and that he was entitled to admission, and the record shows that the evidence was utterly ignored by the said United States Immigration Inspector in Charge, who refused to give any credence or weight whatever to the said Hawaiian Birth Certificate, and to the evidence of the witnesses showing and tending to show the Hawaiian Birth of the petitioner.

Seventh: The above-entitled court erred in holding that the return of the respondent to the writ of habeas corpus issued herein [118] was or is sufficient in law, and the said Court erred in refusing to hold that said return was and is insufficient.

Eighth: The above-entitled court erred in refusing to accept the offer made by the petitioner in open court to show by witnesses present in court the fact that he was born in the Hawaiian Islands and a native-born citizen of the United States, and in refusing such evidence.

Ninth: The above-entitled court erred in ordering that the writ of habeas corpus issued herein be discharged and in discharging the said writ, and in remanding the petitioner to the custody of the respondent, the evidence showing that the petitioner was born in the Hawaiian Islands, and there being no evidence to show that the petitioner was an alien Chinese laborer, or that he belonged to any of the classes of persons excluded from admission to the United States.

WHEREAS by the law of the land the writ of habeas corpus should have been made absolute, and the said petitioner, Lee Leong, discharged from custody.

And the said Lee Leong now prays that the order and judgment of the 14th day of June, A. D. 1913, hereinabove mentioned may be reversed, annulled, and held for naught, and that he, the said petitioner, may have such other and further relief as may be proper in the premises.

Dated this 16th day of June, A. D. 1913.

LEE LEONG,

By his Attorneys.

(Sgd.) GEO. S. CURRY.

(Sgd.) ANDREWS & QUARLES.

Received a copy of the above assignment of errors.

(Sgd.) C. C. BITTING,

Assistant United States Attorney, District and Territory of Hawaii. [119]

[Endorsed]: No. 57. (Title of Court and Cause.)
Assignment of Errors. Filed June 16, 1913. A. E.

Murphy, Clerk. By (Sgd.) F. L. Davis, Deputy.
[120]

*In the District Court of the United States in and for
the District and Territory of Hawaii.*

In the Matter of the Petition of LEE LEONG for a
Writ of Habeas Corpus.

Citation on Appeal.

United States of America,—ss.

The President of the United States to the United
States of America, and ROBERT W. BRECK-
ONS, Its Attorney, Greeting:

You are hereby cited and admonished to be and ap-
pear at the United States Circuit Court of Appeals
for the Ninth Circuit, to be held at the City and
County of San Francisco, State of California, within
thirty days from the date of this Writ, pursuant to
an order allowing an appeal, filed in the Clerk's of-
fice of the United States District Court for the Dis-
trict and Territory of Hawaii, wherein Lee Leong
is appellant and you are appellee, to show cause, if
any there be, why the judgment in said appeal men-
tioned should not be corrected, and speedy justice
should not be done to the parties in that behalf.

Witness the Honorable EDWARD DOUGLASS
WHITE, Chief Justice of the Supreme Court of the
United States of America, this 16th day of June,
A. D. 1913, and of the Independence of the United

States the one hundred and thirty-seventh.

C. F. CLEMONS,

Judge, U. S. District Court, District and Territory
of Hawaii.

[Seal]

Attest: A. E. MURPHY,
Clerk, U. S. District Court.

By F. L. Davis,
Deputy Clerk.

Received a copy of the within citation.

C. C. BITTING,

Assistant United States Attorney,

*U. S. District Attorney, District and Territory of
Hawaii.*

Let the within citation issue.

CHAS. F. CLEMONS,

Judge of said Court. [121]

[Endorsed]: No. 57. (Title of Court and Cause.)
Citation on Appeal. Filed Jun. 16, 1913. A. E.
Murphy, Clerk. By (Sgd.) F. L. Davis, Deputy.
[121a]

*In the District Court of the United States in and for
the District and Territory of Hawaii.*

In the Matter of the Petition of LEE LEONG for a
Writ of Habeas Corpus.

Praeceptum for Transcript.

To the Clerk of the Above-entitled Court:

You will please prepare transcript of the record in
this cause, to be filed in the office of the Clerk of the
United States Circuit Court of Appeals for the Ninth
Judicial Circuit, and include in said transcript the

following pleadings, proceedings and papers on file, to wit:

1. Petition for a writ of habeas corpus, filed May 16, 1913.

2. Order for issuance of writ of habeas corpus, filed May 16, 1913.

3. Writ of habeas corpus, and return of service, filed May 17, 1913.

4. Return of Richard L. Halsey to writ of habeas corpus, filed May 22, 1913.

5. Exceptions to return and motion to discharge, filed May 26, 1913.

6. Decision overruling exceptions to return, and denying motion to discharge petitioner, filed June 2, 1913.

7. Petitioner's traverse and answer to return of respondent, filed June 5, 1913.

8. Judgment discharging the writ of habeas corpus, and remanding the petitioner, filed June, 14, 1913.

9. Petition for appeal, filed June 16, 1913.

10. Assignment of errors, filed June 16, 1913.

11. Order allowing appeal, filed June 16, 1913.

12. Citation on appeal, filed June 16, 1913. [122]

13. All minute entries in the above-entitled cause.

14. Transcript of all testimony and proceedings.

15. This praecipe.

16. Bond for costs on appeal.

17. Clerk's Certificate to Transcript.

Said transcript to be prepared as required by law, and the rules of this Court, and the rules of the United States Circuit Court of Appeals for the Ninth

Circuit, and filed in the office of the Clerk of said Circuit Court of Appeals at San Francisco, in the State of California, before the 16th day of July, A. D. 1913.

Dated this 20th day of June, A. D. 1913.

LEE LEONG,

Said Petitioner, Appellant.

By ANDREWS & QUARLES,

GEO. S. CURRY,

His Attorneys.

[Endorsed]: No. 57. (Title of Court and Cause.)
Praecipe for Transcript. Filed Jun. 20, 1913. A.
E. Murphy, Clerk. By (Sgd.) F. L. Davis, Deputy.
[123]

*In the District Court of the United States in and for
the District and Territory of Hawaii.*

In the Matter of the Petition of LEE LEONG for a
Writ of Habeas Corpus.

ON APPEAL TO THE CIRCUIT COURT OF
APPEALS FOR THE NINTH JUDICIAL
CIRCUIT OF THE UNITED STATES.

Bond on Appeal.

KNOW ALL MEN BY THESE PRESENTS:
That we, Lee Leong, petitioner-appellant in the
above-entitled cause, as principal, and Lee Chuck and
Yee Yap of Honolulu, City and County of Honolulu,
in the Territory of Hawaii, merchants, as sureties,
are held and firmly bound unto Richard L. Halsey,
United States Immigration Inspector in Charge, in
the sum of FIVE HUNDRED DOLLARS (\$500.00),
lawful money of the United States, to be paid to the

aforesaid Richard L. Halsey, United States Immigration Inspector in Charge, his respective executors, successors, administrators and assigns, to which payment well and truly to be made, we bind ourselves and each of us, our and each of our respective heirs, administrators, executors and assigns, jointly and severally, firmly by these presents.

Sealed with our seals and dated at Honolulu, City and County of Honolulu, in the Territory of Hawaii, this 21st day of June, A. D. 1913.

WHEREAS, the above-bounded Lee Leong, petitioner-appellant, has appealed to the United States Circuit Court of Appeals for the Ninth Judicial Circuit of the United States, from the final order and judgment dismissing the writ of habeas corpus issued [124] in this proceedings, and remanding the petitioner-appellant into the custody of Richard L. Halsey, United States Immigration Inspector in Charge at the port of Honolulu, in the District and Territory of Hawaii, made and entered up by and in said Court on the 14th day of June, A. D. 1913, in the above-entitled proceeding, by the above-entitled court, and praying that said judgment and order and each of them may be reversed;

NOW, THEREFORE, the condition of this obligation is such that if the above-named Lee Leong, petitioner-appellant aforesaid, shall prosecute his appeal to effect and shall answer all damages and costs to which the said Richard L. Halsey, United States Immigration Inspector in Charge, may be entitled, if he fail to make his appeal good, then this obligation shall be void; otherwise the same shall remain in full force and effect.

IN WITNESS WHEREOF the aforesaid principal and the aforesaid sureties have hereunto set their hands and seals at Honolulu, City and County of Honolulu, District and Territory of Hawaii, this 21st day of June, A. D. 1913.

(Sgd.) In Chinese (LEE LEONG), [Seal]
Principal.

(Sgd.) LEE CHUCK, [Seal]

(Sgd.) YEE YAP, [Seal]

Sureties.

Witness to signature of Lee Leong:

(Sgd.) GEO. S. CURRY.

The foregoing bond is approved as to form, amount and sufficiency of sureties.

Dated, Honolulu, Territory of Hawaii, June 23, 1913.

(Sgd.) S. B. DOLE,
Judge, United States District Court in and for the
District and Territory of Hawaii.

United States of America,
Territory of Hawaii,
City and County of Honolulu,—ss.

Lee Chuck and Yee Yap, being severally sworn, say: The said Lee Chuck, that he resides at Honolulu, in the Territory of Hawaii, and is worth the sum of more than ONE THOUSAND DOLLARS [125] in property, not by law exempt from execution, over and above all his debts and liabilities; and the said Yee Yap, that he resides in Honolulu, in the Territory of Hawaii, and is worth the sum of more than ONE THOUSAND DOLLARS, in property, not by

law exempt from execution, over and above all his debts and liabilities.

(Sgd.) LEE CHUCK.

(Sgd.) YEE YAP.

Subscribed and sworn to by the said Lee Chuck and Yee Yap, before me this 21st day of June, A. D. 1913.

[Seal] (Sgd.) S. DE FREEST,

Notary Public, First Judicial Circuit, Territory of Hawaii.

[Endorsed]: No. 57. (Title of Court and Cause.)
Bond on Appeal. Filed Jun. 23, 1913. A. E. Murphy, Clerk. By (Sgd.) F. L. Davis, Deputy Clerk.
[126]

**[Certificate of Clerk U. S. District Court to
Transcript of Record.]**

*In the United States District Court in and for the
District and Territory of Hawaii.*

No. 57.

In the Matter of the Petition of LEE LEONG for
a Writ of Habeas Corpus.

United States of America,
District of Hawaii,—ss.

I, A. E. Murphy, Clerk of the District Court of the United States for the District of Hawaii, do hereby certify that the foregoing pages, numbered from 1 to 127, inclusive, to be a true and complete transcript of the record of proceedings had in said court in the matter of the Petition of Lee Leong for a Writ of Habeas Corpus, as the same remains of rec-

ord and on file in my office, and I further certify that I hereto annex the original citation on appeal and orders extending time to transmit record on appeal in said cause.

I further certify that the cost of the foregoing transcript of record is \$36.35, and that said amount has been paid by appellant.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court this 15th day of October, A. D. 1913.

[Seal]

A. E. MURPHY,

Clerk, United States District Court, Territory of Hawaii. [127]

[Endorsed]: No. 2331. United States Circuit Court of Appeals for the Ninth Circuit. Lee Leong, Appellant, vs. The United States of America, Appellee. In the Matter of the Petition of Lee Leong for a Writ of Habeas Corpus. Transcript of Record. Upon Appeal from the United States District Court for the Territory of Hawaii.

Received and filed October 23, 1913.

FRANK D. MONCKTON,

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Meredith Sawyer,

Deputy Clerk.

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT.

LEE LEONG,

Appellant,

vs.

THE UNITED STATES OF AMERICA,

Appellee.

In the Matter of the Petition of LEE LEONG for a
Writ of Habeas Corpus.

BRIEF ON BEHALF OF APPELLANT.

STATEMENT OF CASE.

On the 16th day of May, 1913, the apellant filed his petition for a Writ of Habeas Corpus in the United States District Court for the Territory of Hawaii and the writ was then issued. In the petition apellant set forth the following facts:

That he was born on the Island of Oahu, Hawaii, on the 21st day of January, 1888, and at the time of such birth both of his parents were permanent residents of Hawaii; his father's name being Lee Sing and his mother's name being Lum Shee; that he lived in Hawaii four years and was then taken to the Vil-

lage of Sun Chin, China, by his parents, where he lived until February, 1913, when he sailed for Honolulu, reaching Honolulu the 10th day of March, 1913, as a passenger on the S. S. Siberia; that on the 21st day of November, 1912, the Secretary of the Territory of Hawaii, after application, upon due and orderly hearing, as provided by law, issued to and for the petitioner a certificate of Hawaiian birth, certifying that this petitioner was born in the Hawaiian Islands on or about the 21st day of January, 1888, to which certificate was attached the Great Seal of the Territory and the photograph of petitioner; that petitioner was denied a landing by Richard L. Halsey, Immigration Inspector in Charge, United States Immigration Service; that petitioner was given the semblance of a hearing to determine whether he should be allowed to land or be returned to China; that said hearing was not a fair and bona fide hearing; that at said hearing the said certificate of Hawaiian birth was presented to the said Immigration Officer and a large number of witnesses examined, who testified that petitioner was born at Waikiki; that such proceedings were conducted illegally and improperly and the Immigration authorities did not arrive at a conclusion, or make findings, based upon the testimony of the witnesses, and did not give any weight to the certificate of Hawaiian birth presented, and did not base the decision or conclusion made on the evidence offered, but denied petitioner admission and ordered him deported to China, in spite of the evidence in the case, and in excess of the jurisdiction vested in them, and without giving to the petitioner a fair and impartial hearing.

With said petition the petitioner annexed a copy

of the evidence taken before the Immigration Officers, and a copy of said Hawaiian birth certificate.

The writ was made returnable before the Honorable Charles F. Clemons, one of the Justices of the said District Court, on the 21st day of May, 1913, at ten o'clock A. M. (Tr. 89), and the proceedings continued to the 27th of May. (Tr. 91.) May 27th, Richard Halsey, Inspector in Charge, filed his return to the writ. (Tr. 91-96, inc.) To the said return, the petitioner filed exceptions and motion to discharge (Tr. 96-99), upon the following grounds: Among others, that said return, in the nature of a demurrer, attempted to deny certain facts stated in the petition, attempted to plead new matter in avoidance of other facts stated in said petition, and did not respond to the writ by showing the facts, circumstances and proceedings under which the petitioner was being detained, and consisted largely of conclusions; that such return as a whole was insufficient and did not show proceedings under which the petitioner was detained or could legally be detained.

The hearing of said cause was continued from May 27th to May 28th. (Tr. 100.)

The Inspector in Charge, as respondent, moved to strike petitioner's exceptions to the return on various grounds. (Tr. 100-101.)

Various continuances were had until June 4, 1913. June 5, 1913, the petitioner filed answer or response to the return. June 7th, the case was continued to June 10th, and each side given to June 12, 1913, to file briefs on the weight to be given the Chinese birth certificates. (Tr. 109.)

June 14th, certain amendments to the petition were allowed, and it was ordered that a copy of the decision of the Secretary of Labor be attached to the

petition and the petitioner be at large on bail in the sum of \$2,000. (Tr. 110.) June 14th, judgment was rendered discharging the writ, denying the petition and remanding the petitioner to the custody of respondent, fixing the recognizance of the petitioner in the sum of \$2,000, pending appeal. (Tr. 117-118.)

A careful study of the appeal record shows that the proceedings in the District Court were irregular, in that the cause seems to have been heard by piecemeal, numerous and divers adjournments were had, and that on the 14th day of June the cause was reopened, divers amendments allowed and further evidence heard. (Tr. 120 to 146, inc.)

The petition for appeal was filed June 16, 1913. The order allowing appeal was made on the same day, and the petitioner's assignments of error were filed with the petition for appeal, and citation on appeal issued on the same day. (Tr. 157 to 164, inc.) Bond on appeal was given on the 21st day of June, 1913. (Tr. 166-169.) Nearly four months after the appeal had been perfected, the Honorable Charles F. Clemons, Judge, who heard the case, filed a written decision in the case. (Tr. 146 to 156.)

The assignments of error are nine in number, and we will take them up in the argument.

ARGUMENT.

This cause is of great importance to the petitioner. He has constitutional rights at stake. He is a citizen of the United States by virtue of having been born in the Kingdom of Hawaii in January, 1888, and by reason of the provisions of Section 4 of the Act of Congress, April 30, 1900, 31 Stats. L. 141 c. 339, and subsequent acts amending the same. By

the provisions of the Constitution of the Republic of Hawaii, adopted in 1894, Article 17, Section 1, all persons born or naturalized in the Hawaiian Islands and subject to the jurisdiction of the Republic of Hawaii are citizens thereof. By statute, Act 96, Session Laws of Hawaii, 1911, the Secretary of Hawaii is authorized to issue to persons born in Hawaii certificates of Hawaiian birth, and the same are made *prima facie* evidence. This case is important not only to the petitioner, but to many others, the principal question being whether an Immigration Inspector may, arbitrarily and summarily, without evidence to the contrary, ignore and refuse a citizen admission on the ground that he does not believe the witnesses who testify for him, and in the face of the fact that such citizen has an Hawaiian birth certificate.

We will now consider the assignments of error.

FIRST AND SECOND ERRORS. FIRST: THE ABOVE-ENTITLED COURT ERRED IN REFUSING TO SUSTAIN THE EXCEPTIONS OF THE PETITIONER TO THE RETURN OF THE RESPONDENT, SAID RETURN BEING INSUFFICIENT IN LAW, IN THAT THE SAID RETURN DID NOT SHOW THAT THE PETITIONER WAS HELD UNDER ANY VALID ORDER OR PROCESS, AND DID NOT SHOW THAT THE PETITIONER WAS A CHINESE LABORER, OR ALIEN BORN, OR WITHIN ANY OF THE CLASSES OF PERSONS EXCLUDED FROM ADMISSION TO THE UNITED STATES. (Tr. 159-160.) SECOND: THE ABOVE ENTITLED COURT ERRED IN REFUSING TO GRANT THE MOTION OF THE *PETITION* FOR HIS DIS-

CHARGE UPON THE FACE OF THE SAID RETURN, THE SAID RETURN BEING INSUFFICIENT FOR THE REASONS STATED IN THE FIRST ASSIGNMENT OF ERROR HEREIN. (Tr. 160.) The return to the petition was insufficient in law in that it did not show that the petitioner belonged to any of the classes excluded from admission to the United States, and did not show that the petitioner was alien born. The said return amounted to denials and admissions of the Hawaiian birth, objections to the sufficiency of the petition which had been passed upon in the first instance by the issuance of the writ and had become *functus officio*. The said return (Paragraph 5) neither admits nor denies the allegations of the third paragraph of appellant's petition, which paragraph related to the Hawaiian birth of the petitioner. Failing to show that the petitioner was of alien birth, the Inspector in Charge had no jurisdiction whatever to deny him a landing on the ground, as the return seems to attempt to justify, that his parents were Chinese and lived in China. This assignment of error, we contend, is well taken, should have been sustained, and the motion of the appellant for his discharge should have been granted. The Inspector in Charge, without showing or stating in his return that the appellant was of alien birth, but, on the other hand, "neither admits nor denies" the same, the time of the District Court should not have been consumed in any further hearing whatever of the case, but the petitioner should have been summarily discharged from the restraint of the Inspector. An analysis of the return would seem to show that the respondent claims that he is not bound to accept an Hawaiian birth certificate as *prima facie* evidence,

that he is not bound to believe any witness that testifies as to the birth of the petitioner, and that he may arbitrarily and summarily refuse to permit a citizen to land and order him deported when he himself cannot show whether or not he is a citizen or native born. We submit that such a return does not comply with the letter, spirit or intent of Section 757, Revised Statutes (3d Fed. Stat. Ann. 173), which provides :

“The person to whom the writ is directed shall certify to the court or justice or judge before whom it is returnable the true cause of the detention of such party.”

The procedure in habeas corpus cases is prescribed very fully in the Acts of Congress relating thereto. The substance of the return is provided by the statute above quoted. Nowhere in the statutes relating to habeas corpus do we find any provision for a demurrer to the petition. We submit that under these statutory provisions that a return in the nature of an answer to a bill in equity where the respondent neither admits nor denies, but leaves the complainant to his proof, is insufficient. The return seems to contemplate that the Inspector in Charge may arbitrarily and summarily hear evidence proving an applicant's citizenship by birth, and, without any contradictory evidence, arbitrarily refuse to accept it, order his deportation, and justify the same by the legal conclusion which appears in the return herein as follows :

“That the petitioner was accorded such a hearing as was fair and impartial.” (Tr. 94.)

The exception of the petitioner to the said return should have been sustained and the petitioner should have been discharged.

THIRD, FOURTH AND FIFTH ERRORS.

THIRD: THE ABOVE - ENTITLED COURT ERRED IN RULING THAT THERE WAS EVIDENCE IN THE RECORD ATTACHED TO THE PETITIONER'S PETITION AS EXHIBIT "A" SUFFICIENT TO SHOW THAT THE PETITIONER WAS ALIEN BORN AND NOT BORN IN THE HAWAIIAN ISLANDS. (Tr. 160.) FOURTH: THE ABOVE-ENTITLED COURT ERRED IN RULING THAT THERE WAS EVIDENCE IN SAID RECORD ATTACHED TO THE PETITIONER'S PETITION AS EXHIBIT "A" SUFFICIENT TO SUPPORT THE ORDER MADE BY THE UNITED STATES IMMIGRATION INSPECTOR IN CHARGE DENYING THE PETITIONER'S ADMISSION TO THE UNITED STATES AND ORDERING HIS DEPORTATION; ALL OF THE EVIDENCE IN THE RECORD SHOWS AND TENDS TO SHOW THAT THE PETITIONER WAS BORN IN THE HAWAIIAN ISLANDS, LIVED IN THE HAWAIIAN ISLANDS UNTIL HE WAS 4 YEARS OF AGE, WHEN HE WAS TAKEN TO CHINA BY HIS PARENTS, AND THERE BEING NO EVIDENCE WHATEVER IN THE RECORD SHOWING THAT THE PETITIONER HAD VOLUNTARILY EXPATRIATED HIMSELF BY FORSWEARING ALLEGIANCE TO THE UNITED STATES OR SWEARING ALLEGIANCE TO ANY FOREIGN GOVERNMENT WHATEVER. (Tr. 160.) FIFTH: THE ABOVE-ENTITLED COURT ERRED IN RULING THAT THERE IS OR WAS EVIDENCE IN THE SAID RECORD JUSTIFYING THE UNITED STATES IMMIGRATION INSPECTOR IN CHARGE IN IGNORING THE HAWAIIAN BIRTH CERTIFI-

CATE PRESENTED BY THE PETITIONER, A COPY OF WHICH IS ATTACHED TO THE PETITIONER'S PETITION AS EXHIBIT "B," THERE BEING NO EVIDENCE WHATEVER IN THE SAID RECORD IMPEACHING THE SAID HAWAIIAN BIRTH CERTIFICATE AND NO EVIDENCE WHATEVER SHOWING THAT THE FACT OF HAWAIIAN BIRTH OF THE PETITIONER STATED IN SAID HAWAIIAN BIRTH CERTIFICATE WAS OR IS NOT TRUE. (Tr. 160-161.) THE COURT ERRED IN HOLDING THAT THERE WAS EVIDENCE IN THE RECORD ATTACHED TO THE PETITIONER'S PETITION AS EXHIBIT "A" SUFFICIENT TO SHOW THAT THE PETITIONER WAS ALIEN BORN AND NOT BORN IN THE HAWAIIAN ISLANDS. These assignments of error bring us to a consideration of the evidence in the case. In the beginning of the proceedings before the Inspector (Tr. 18), we find the following:

"Applicant presents Hawaiian Birth Certificate No. 95A, dated Nov. 21, 1912."

It was admitted that the photograph attached to the Hawaiian birth certificate represented the petitioner and established his identity. (Remarks of the Court, Tr. 121.) Mr. Halsey admits that the original certificate is in the Immigration Office and has been returned from Washington. (Tr. 125.) In the written decision filed nearly four months after the appeal had been taken in this case the Court says:

"At the hearing the fact of the issuance of the certificate and the identity of the petitioner with the person whose photograph is annexed thereto, were admitted by the Government." (Tr. 149.)

Under the Hawaiian statute this Hawaiian birth certificate is *prima facie* evidence of the Hawaiian birth of the petitioner and *prima facie* entitled him to enter into the United States. The validity of this Hawaiian certificate is not attacked. It is not claimed that it was procured by fraud or any improper means whatever. It is simply ignored by the Inspector in Charge.

In addition to the Hawaiian certificate, the petitioner testified to his Hawaiian birth, only from hearsay and from having heard his mother talk about it at different times—the only way he could know it.

Lee Yet testified (Tr. 26-33), and his evidence is in substance as follows: He knew by repute that petitioner was born in Hawaii. He was told so by Lee Sing and by Lum Shee, the father and mother of petitioner, when he was a boy in Hawaii. He heard the petitioner's Hawaiian birth frequently discussed when he was young in China.

Lee Wo testified (Tr. 33-38), in substance, that he was living in Sun Chin, China; that he first saw the petitioner when petitioner was three or four years old; that he saw the parents of petitioner with petitioner come to the village, having come from Hawaii; that he saw them after arrival and on their arrival they said they were from Hawaii; that petitioner had a sister younger than he.

Siu Sam, fifty years of age, testified (Tr. 39-42): That she came to Hawaii thirty years ago. That Lee Sing and Lum Shee, his wife, lived in Hawaii before petitioner was born; that they lived at Wai-kiki, at Kong Sing banana plantation; that she lived near them; that they had a son and a daughter born to them in Hawaii, the son being Lee Leong, the petitioner, and the daughter, Lee Moy; that the peti-

tioner was three or four years old when she first saw him and that she knew that they went from Hawaii to China.

Lee Keau (Kow) (Tr. 43-47) testified that petitioner was born in Hawaii and that he knew it from declarations of the parents of petitioner; that he was living in Sun Chin village, China, when the parents of petitioner returned from Hawaii; that petitioner was then four or five years old; that when the witness came to Hawaii the petitioner was about ten years old; that he saw the petitioner in China in 1910.

Lee Chew testified (Tr. 47-51) that he knew of his own knowledge that petitioner was born at Waikiki; that he (the witness) visited the parents of petitioner before they had any children; that said parents of petitioner lived on Kong Sing banana plantation, Waikiki, Hawaii, when witness went there; that afterwards he attended a dinner given by Lee Sing and Lum Shee to celebrate the birth of the petitioner, who was then one month old; that he visited their house often, sometimes once a week, sometimes two or three times a month, while they lived in Hawaii and before they went to China, and that they went to China about twenty years ago.

Lee Lau testified (Tr. 56-63) in substance that the parents of Lee Leong lived in China; that the witness first came to Honolulu in 1900 and was then seventeen years old; that he went back to China in 1910 and returned in July, 1912; that he was born in Sun Chin, China; that petitioner is twenty-four or twenty-five years old; that his parents live in Sun Chin, China; that petitioner was born at Waikiki, Honolulu; that petitioner was four or five years old when he first saw him; that he came with his parents

from Hawaii to China; that his parents said they came from Hawaii; that many people in Sun Chin, China, said that petitioner was born in Hawaii.

Lee Lung testified (Tr. 64-69) that petitioner was four or five years old when he first saw him; that he first saw him at Sun Chin village, China; that petitioner came from Hawaii with his parents; that he saw the petitioner and his parents when they arrived in a boat and saw them go along the street into the village; that was the first time that he ever saw them. The witness also testified that when he came to Hawaii petitioner was eight or nine years old.

Lee Sau also testified (Tr. 70-74) that he was living in Sun Chin, China, when Lee Sing and Lum Shee came from the Hawaiian Islands to China; that they brought with them the petitioner, then a boy four or five years of age, and a daughter, Lee Moy, younger than petitioner; that he saw them when they first came back to China and that the parents of petitioner then said they came from Hawaii.

Lee King testified (Tr. 75-81) that Lee Leong, the petitioner, was born in Hawaii; that he first saw him at Waikiki when he was three or four years old; that his father was working on a banana plantation; that he visited them for about a year at Waikiki and that he afterwards saw the petitioner in China in 1909. He did not recognize petitioner, but did recognize the father of petitioner, and petitioner's father said that he was the boy that was born in Hawaii.

Lee Yau testified (Tr. 81-86) that he saw Lee Leong in China before he came to Hawaii; that the petitioner was then four or five years old; saw him at Sun Chin village with his parents; that petitioner came to China from Hawaii with his parents when he was about four years old; that the witness came

to Hawaii when petitioner was about eight or nine years old; that petitioner's parents told him that petitioner was born in Hawaii. The witness did not see the parents of petitioner return to Sun Chin, China, but saw them a few days afterwards; that he believes the petitioner was born in Hawaii because his parents told him he was.

Of course, on a few immaterial matters the testimony of these witnesses is inconsistent and to some extent contradictory, but on the main fact, the Hawaiian birth of the petitioner, the evidence is all one way. Three of the witnesses—Siu Sam, Lee Chew and Lee King—saw the petitioner when he was a small child, one of them when he was a month old, with his parents at Waikiki on a banana plantation, and saw him frequently and visited his parents frequently in Hawaii until they returned to China, when the petitioner was about four years of age. The other witnesses—Lee Yet, Lee Wo, Lee Lau, Lee Lung, Lee Sau, and Lee Yau—all saw the appellant in China with his said parents when he was four years old or more. Some of them actually saw the family returning from Hawaii to the village of Sun Chin. The Inspector in Charge has no right nor power nor jurisdiction to absolutely shut his ears to all evidence, refuse to believe all evidence, refuse to accept any evidence, and arbitrarily say: "You cannot come into the United States." What witness in this case has testified to the fact that the petitioner was born in China? What witness in this case has testified to any facts impeaching the Hawaiian birth certificate and impeaching the evidence of these witnesses? What witness has testified to any fact showing that the petitioner was not born at Waikiki, on the Island of Oahu, in the Kingdom of Hawaii,

in the year 1888? We insist that the third, fourth and fifth assignments of error should all be sustained; that there is no evidence in the record impeaching the Hawaiian birth certificate; no evidence showing it was procured by fraud or mistake or upon false evidence; and no evidence in the record showing that the petitioner is of alien birth, but, on the other hand, there is considerable evidence showing that the petitioner was born on a banana plantation at Waikiki, Hawaii. It is an easy matter to state a generality, to state a conclusion or an opinion, but in a case of this kind the question is, is such conclusion justified by the facts? Applying the ordinary rules of evidence and ordinary rules of law to this case, we say that the record shows beyond peradventure that the petitioner is of Hawaiian birth, and, therefore, a citizen, and entitled to admission, and that the Immigration Inspector has no jurisdiction to order him deported to the country whence he came.

SIXTH ERROR. SIXTH: THE ABOVE-ENTITLED COURT ERRED IN HOLDING THAT THE PETITIONER WAS GIVEN A FULL AND FAIR HEARING BY THE UNITED STATES IMMIGRATION INSPECTOR IN CHARGE, IN THAT THE ENTIRE RECORD SHOWS THAT THE PETITIONER ESTABLISHED BY EVIDENCE THE FACT OF HIS HAWAIIAN BIRTH, AND THAT HE WAS ENTITLED TO ADMISSION, AND THE RECORD SHOWS THAT THE EVIDENCE WAS UTTERLY IGNORED BY THE SAID UNITED STATES INSPECTOR IN CHARGE, WHO REFUSED TO GIVE ANY CREDENCE OR WEIGHT WHATEVER TO THE SAID HAWAIIAN BIRTH CERTIFICATE, AND TO THE EVIDENCE OF

WITNESSES SHOWING AND TENDING TO SHOW THE HAWAIIAN BIRTH OF THE PETITIONER. (Tr. 161.) We earnestly contend, with all respect to the trial judge, that the sixth assignment of error is well taken and should be sustained. Reading and studying this record through, there seems to have been a studied and persistent effort on the part of the Inspector to discredit the evidence of witnesses. It must be borne in mind that here is a Chinaman who, although of Hawaiian birth, and a citizen, had been in China from the time he was four years of age, ignorant of the English language, without counsel, and the Inspector acting as a prosecutor would act in a criminal case, endeavoring to discredit the petitioner and every witness who testified for him; and we insist that this record shows pronouncedly that the Chinese Inspector who examined petitioner and the various witnesses was laboring, not to ascertain the truth, but for the purpose of endeavoring to get inconsistencies upon immaterial matters into the record, so that the witnesses might be discredited and their evidence ignored. We insist that this is not a fair hearing. We insist also that the evidence of Mr. Halsey is subject to the criticism, that it is not fair and frank and openly given. (Tr. 121 to 136.) His answers are evasive. He continually objected to answering questions. Certain admissions made by him were reluctantly made and the record so shows, and, without doing any injustice whatever to Mr. Halsey, we think that his examination in court shows prejudice against the petitioner, and does not show that he was earnestly endeavoring to ascertain the truth, but that his actions and those of the inspectors under him were directed to one thing, and that was to keep the petitioner out and

not let him in United States territory. As an example, counsel for the petitioner was endeavoring to show that certain reports and matters had been sent to Washington, and statements made by Mr. Halsey had been sent for the purpose of having an influence upon the case which were not delivered to petitioner and which had not been shown in court in this case. Take the cross-examination of Mr. Halsey, commencing on page 121 of the transcript, and note the effort required to get him to admit that the report and recommendations of Merlen J. Moore were sent to Washington. Note the question:

“Q. Now, isn't it a fact, Mr. Halsey, that Mr. Moore made a report to you and that report was considered by you?

A. You have the full record of the case.

Q. Didn't Mr. Moore make a report to you in writing as to the effect of the evidence and his conclusions?

A. The memorandum, the Inspector made a memorandum on the case and I made my decision on the record.”

Further on he reluctantly admits that the report was sent to Washington, but says not as a part of the record, but separate from it. He also admits that he sent a letter of transmission and that certain recommendations were made in it, but he objects to producing the letter, but was finally compelled by the court to do so, and when the letter is produced and a portion of it read into the record (Tr. 131-132), we find in his said letter the following:

“In view of the record, it is recommended that the appeal be dismissed. The Hawaiian birth certificate presented by the applicant (Exhibit ‘ ’), is in-

closed together with two communications, by the examining inspector, giving a general synopsis of the case."

Mr. Halsey endeavors to make it appear that he considered the entire record. And he is compelled to admit (Tr. 133) that he did not read laborers' permits mentioned in report of Moore and other evidence introduced for the purpose of verifying or contradicting or impeaching witnesses; and on page 134 he says he does not know whether such records were shown to the petitioner or not; that he knows they were before the Inspector. He does not know whether they were shown to petitioner or shown to the witnesses or not.

It thus appears that a portion at least of the examination was secret and not disclosed to the petitioner or to the witnesses. Is this a fair hearing? And is it fair for an Inspector to act as judge upon the rights of an American citizen to come into his own country? To act as a prosecutor and recommend to the appellate power, the Commissioner of Labor, that the appeal be dismissed? And is there not enough in this record to show that the Inspector in Charge has acted as a partisan, biased and prejudiced against the petitioner, and acted as his prosecutor, shown the disposition to keep him wrongly out of the United States, instead of giving that deliberate, calm and judicial consideration to the evidence in the case which should be given, and then giving that evidence the weight to which it is fairly entitled under all rules of evidence, law, equity and justice? Did Congress intend that the Inspector in Charge of an Immigration Station, or that examining inspectors at such a station, should have the unlimited and arbitrary power of simply saying "Yes"

or "No," regardless of the evidence produced to show whether or not an immigrant is entitled to land? We cannot find such an intent in the Statutes. We think that this assignment of error should be sustained. And we desire to call attention now to what we regard as a correct principle, to-wit: That when the Supreme Court of the United States said that an immigrant is entitled to a fair hearing, that it meant to say that the case should not only be fairly presented in behalf of the applicant, but that it should also be fairly decided on the evidence of the case. To be fair in permitting the introduction of evidence and then to unfairly consider that evidence, or ignore it altogether, does not give a fair hearing, which, of necessity, includes a fair determination and decision upon the evidence introduced at the hearing. Here the evidence is all one way, in support of the fact of Hawaiian birth. Of course, much of it is hearsay evidence and not entitled to a great deal of weight, but on no material fact at issue, or involved, is there any contradiction or conflict in the evidence.

SEVENTH ERROR. SEVENTH: THE ABOVE-ENTITLED COURT ERRED IN HOLDING THAT THE RETURN OF THE RESPONDENT TO THE WRIT OF HABEAS CORPUS ISSUED HEREIN WAS OR IS SUFFICIENT IN LAW, AND THE SAID COURT ERRED IN REFUSING TO HOLD THAT SAID RETURN WAS AND IS INSUFFICIENT. (Tr. 161.) This error covers to a large extent the first and second assignments of error, and under this head we desire to emphasize the position which we have taken, that the said return, viewed by the Act of Congress relating to habeas corpus cases, nowhere shows that the plaintiff is a Chinaman,

alien born, and nowhere shows that the petitioner was not born in Hawaii, but does take the position that the respondent neither denies nor admits his Hawaiian birth. This being true, the respondent shows no just cause for detention of the petitioner, nor for refusing to admit him, nor for ordering his deportation.

EIGHTH ERROR. EIGHTH: THE ABOVE-ENTITLED COURT ERRED IN REFUSING TO ACCEPT THE OFFER MADE BY THE PETITIONER IN OPEN COURT TO SHOW BY WITNESSES PRESENT IN COURT THE FACT THAT HE WAS BORN IN THE HAWAIIAN ISLANDS AND A NATIVE-BORN CITIZEN OF THE UNITED STATES, AND IN REFUSING SUCH EVIDENCE. (Tr. 161.) At the trial the petitioner had present a number of witnesses who would testify to his Hawaiian birth, and offered to prove that fact, but the trial court peremptorily refused to hear such evidence. (Tr. 143.) The offer was made, the court declined to hear the evidence, and the petitioner duly excepted. We claim that this was error.

NINTH ERROR. NINTH: THE ABOVE-ENTITLED COURT ERRED IN ORDERING THAT THE WRIT OF HABEAS CORPUS ISSUED HEREIN BE DISCHARGED AND IN DISCHARGING THE SAID WRIT, AND IN REMANDING THE PETITIONER TO THE CUSTODY OF THE RESPONDENT, THE EVIDENCE SHOWING THAT THE PETITIONER WAS BORN IN THE HAWAIIAN ISLANDS, AND THERE BEING NO EVIDENCE TO SHOW THAT THE PETITIONER WAS AN ALIEN CHINESE LABORER, OR THAT HE BELONGED TO ANY

OF THE CLASSES OF PERSONS EXCLUDED FROM ADMISSION TO THE UNITED STATES.

(Tr. 162.) A discussion of the ninth assignment of error involves a discussion of the other errors assigned, and therefore, what we have here tofore said in regard to the other assigned errors, applies to this one.

We desire to emphasize, although at the expense of repetition, our contention that the immigration authorities have no right, power, or authority, to ignore the positive evidence in a case and refuse to give it weight. Such action is not according to the appellant a fair hearing. In this case the right of appellant to enter the United States was based upon his citizenship. The immigration authorities had no right whatever, without evidence, to deny his entry. The burden of showing that he belonged to one of the excluded classes was upon the immigration authorities.

U. S. ex rel. Castro vs. Williams, 203 Fed. 155. In this case the appellant had citizenship rights which the immigration authorities had no jurisdiction or authority whatever to ignore, but were bound to respect the same, and the arbitrary denial of those rights is not a fair hearing, and does not come within the purview of any Act of Congress. Immigration authorities act in an administrative, and not judicial capacity, and must follow definite standards. One of the definite standards recognized in American jurisprudence is that an American citizen may come and go at his will and cannot be excluded from entry into the United States when he has been in a foreign country.

U. S. vs. Uhl, 203 Fed. 152.

U. S. ex rel. Castro vs. Williams, id. 155.

“The law is well settled that one born in the United States of Chinese parents who were permanently domiciled here, though an alien, is a citizen of the United States, and cannot be excluded therefrom, or denied the right of entry.”

Lee Sing Far. vs. United States, 94 Fed. 834, 836.

U. S. vs. Wong Kim Ark, 169 U. S. 649, 705.

“The statutes purport to exclude aliens only. They create or recognize, for present purposes it does not matter which, the right of citizens outside the jurisdiction to return to the United States. If one alleging himself to be a citizen is not allowed a chance to establish his right in the mode prescribed by those statutes, although that mode is intended to be exclusive, the statutes cannot be taken to require him to be turned back without more. The decision of the Department is final, but that is on the presupposition that it was after a hearing in good faith, however summary in form. As between the substantive right of citizens to enter and of persons alleging themselves to be citizens to have a chance to prove their allegations, on the one side, and the conclusiveness of the commissioner’s fiat, on the other, when one or the other must give way, the latter must yield. In such a case something must be done, and it naturally falls to be done by the courts. * * *

“The petitioner then is imprisoned for deportation without the process of law to which he is given a right. Habeas corpus is the usual remedy for unlawful imprisonment. But, on the other hand, as yet the petitioner has not established his right to enter the country. He is imprisoned only to prevent his entry, and an unconditional release would make the entry complete without the requisite proof. *The courts must deal with the matter somehow, and there*

seems to be no way so convenient as a trial of the merits before the judge. If the petitioner proves his citizenship, a longer restraint would be illegal. If he fails, the order of deportation would remain in force."

Chin Yow vs. United States, 208 U. S. 8, 52, L. ed. 369.

In re Su Hen Hoon, Third Dist. Ct. Rep. for Hawaii, 606, the court lays down the rule that Hawaiian birth gives the right to land and this right is not dependent upon any certificate.

In *Chen Hing vs. United States*, 133 Fed. 227, a Chinese immigrant and two other Chinese testified to his birth in the United States and no evidence to contradict the same except a statement made by the immigrant to an inspector prior to hearing. The judgment of the District Court affirming the order for his deportation held reversible for error.

Where a Chinese testified that he was born in the United States and his evidence was corroborated by his uncle and cousin and wholly uncontradicted, the commissioner was not justified in holding that he had not established his right to remain in the United States "by affirmative proof to the satisfaction of the commissioner."

Moy Suey vs. U. S., 147 Fed. 697.

"If she was not an alien immigrant within the intent and meaning of the Act of Congress entitled 'An Act in Amendment of the Various Acts Relative to Immigration and Importation of Aliens under Contract or Agreement to Perform Labor,' approved March 3, 1891 (26 Stat. at L. 1084, chap. 551), the commissioner had no power to detain or deport her, and the final order of the circuit court must be reversed."

Gonzales vs. Williams, 192 U. S. 1.

U. S. vs. Williams, 189 Fed. 915.

“That any person alleging himself to be a citizen of the United States, and desiring to return to his country from a foreign land, and that he is prevented from doing so without due process of law, and who, on that ground, applies to any United States court for a writ of habeas corpus, is entitled to have a hearing and a judicial determination of the facts so alleged; and that no act of Congress can be understood or construed as a bar to such hearing and judicial determination.”

Gee Fook Sing vs. United States, 49 Fed. 146.

“Being a citizen, the law could not intend that he should ever look to the government of a foreign country for permission to return to the United States, and no citizen can be excluded from this country except in punishment for crime. Exclusion for any other cause is unknown to our laws, and beyond the power of Congress.”

Re Look Tin Sing, 10 Sawy. 353, 21 Fed. 905.

See also

Ex parte Chan San Hee, 35 Fed. 354.

Re Yung Sing Hee, 36 Fed. 437.

Re Wy Shing, 36 Fed. 553.

“It is conceded that, if he is a citizen of the United States, the acts of Congress known as the Chinese exclusion acts, prohibiting persons of the Chinese race, and especially Chinese laborers, from coming to the United States, do not and cannot apply to him.”

United States vs. Wong Kim Ark, *supra*.

In the case of *Fong Yim*, 134 Fed. 938, it was held that the courts have jurisdiction to determine in habeas corpus proceedings the right of a Chinese merchant domiciled in this country to enter from

China, or of members of his family whose right is incidental to his own, where the remedy by appeal to the Secretary of Commerce and Labor has been exhausted, and the right of entry denied.

See also *Ex parte Koerner*, 176 Fed. 478.

In *Ex parte Peterson*, 166 Fed. 536, it is held that federal courts may grant relief to a party aggrieved by the action of officials of the department directing the deportation of an alien, when the evidence before such official and on which he acts is uncontradicted and establishes, as a matter of law, that the case is not within the statute. *That rule is conclusive of this case.*

In *United States, ex. rel. Klein vs. Williams*, 189 Fed. 915, the court held that if there is no evidence that an alien immigrant is within one of the excluded classes the immigration authorities have no power to exclude him and order his deportation, and if they do so, such order is a nullity, and he is entitled to discharge from detention thereunder by a writ of habeas corpus.

In the case of *United States vs. Chin Len*, 187 Fed. 544, the relator, a person of the Chinese race, after entering the United States was arrested and taken before a Commissioner who, after a hearing, found him to be a native-born citizen, and entitled to remain in this country, and entered judgment accordingly. More than seven years afterwards the relator left for China on a visit and presented a certified copy of the judgment to the inspector at the port of departure, who made an endorsement thereon. On his return to the same port he was denied admission. There was no evidence that he was not the same person who departed, or to whom the commis-

sioner's judgment related, nor to impeach such judgment, which, on the contrary, was proved to be genuine. Held that under such facts the inspector was not justified in arbitrarily disregarding it, and that his failure to give it proper weight and credit was a denial to the relator of a fair hearing. That authority is in point here.

Apply the same rule to this case and we see that

In the case of *Pang Sho Yin vs. United States*, 154 Fed. Rep. 660, the evidence showed that petitioner was born in the United States, and nothing to the contrary except a statement made by the petitioner, when arrested. He was ordered discharged.

In *Zakonaite vs. Wolf*, 226 U. S. 603, the Supreme Court of the United States reviewed the evidence to see if "it was adequate to support the findings of fact by the immigration officer," the court holding that the courts may go back of the findings of the immigration authorities to see "if the evidence was adequate to support the Secretary's conclusions, and the alien was given a fair hearing."

The logical sequence from the rule is that if the evidence is not adequate to support the findings, the order will be reversed. Any other rule would place the constitutional right of an American-born citizen to land in the United States, or any of its Territories, within the arbitrary will of the immigration officer, an idea that is intolerable. The return of the respondent takes the unique ground that it is neither held that the petitioner is a Chinese laborer, or not a Chinese laborer. It further takes the position that he has lost the right and privileges of his Hawaiian birth, by absence, and counsel for the Government appears to rely upon that fact, something which is a

mere matter of law, and wrongfully determined by the immigration officer. It is inconceivable that Congress intended to place the constitutional rights of the citizen at the arbitrary whim and caprice of immigration officers, or of the Secretary of Commerce and Labor, or intend to usurp and set at naught the functions of the Judicial Department by making the decision of the immigration officer, or of the Secretary of Commerce and Labor, final as to questions of law.

Since December 2, 1912, the date of the decision in the *Zakonaite* case, *supra*, the case of *McNamara vs. Henkle* has been decided (226 U. S. 520), which further lays down the rule that in habeas corpus the failure of the immigration authorities to give full faith and credit to the Hawaiian birth certificate of the appellant and the other evidence which he introduced showing his Hawaiian birth was "failure to give it proper weight and credit," and was a denial to the appellant of a fair hearing.

courts may look into the evidence to see if it is sufficient to establish the facts, upon which one alleged to be a fugitive from justice has been extradited, as showing the commission of a crime, and to see if he has been held upon legal evidence. Apply the same rule to this case, and this court must hold that the evidence in this case fails to establish Hawaiian birth and does establish the foreign birth of the petitioner, something which this, nor any other court, can fairly do from the evidence; and something which the immigration Inspector in Charge did not do. There is no finding of fact to the effect that the petitioner is of foreign birth, or a Chinese laborer, or comes within any of the excluded classes. On the other hand, all of the evidence tends to establish his

Hawaiian birth, and identifies him as the holder of the Hawaiian birth certificate which he presented, and which the Inspector in Charge has, and which the respondent has failed to bring into this court. To uphold the decision of the immigration authorities upon the evidence in this case would be tantamount to placing the liberty and rights of native-born citizens on the mere caprice and whim of immigration authorities, and to hold that the appellant had a fair trial, including a fair decision, that he was not of Hawaiian birth, but that he is a Chinese laborer of foreign birth, in the absence of evidence to establish these facts, and in the face of evidence to the contrary. Such a condition or result was never intended by Congress, nor by the courts in any decision which we have found, but such is the effect of the contention of the appellee in this case.

Going back again to the return of the appellee to the writ of habeas corpus (Tr. 91), we find the said return to be inconsistent. In the second paragraph it is alleged "That if either the petitioner or his parents were ever entitled to entrance into and residence in the United States, the same has long since been abandoned." In the third paragraph there is a denial that the appellant was born at Waikiki, in the Territory of Hawaii, but this denial is destroyed by the further allegation that by acts of his parents citizenship either of the parents of said petitioner or the petitioner himself were surrendered, abrogated and entirely of naught in so far as this proceeding is concerned. And in the fifth paragraph, appellee says he neither admits nor denies the allegations of paragraph three of the said petition. There is in said return no positive allegation showing that the appellant is of foreign birth and no allegation of fact

showing that he belongs to any of the excluded classes of immigrants. The burden is on the immigration authorities to show this, not only by way of allegation in the return, but by proof.

With all due respect to the learned Judge who tried this case below, we desire to say that the written opinion, argumentative in its nature, filed by him October 13, 1913, nearly four months after this appeal has been taken and perfected, should not be considered by the appellate court, regardless of whether it deals fairly or unfairly with the appellant.

At page 155 the learned Judge refers to the report of Inspector Moore to the Inspector, something which was unknown to the petitioner and unknown to his counsel and never discovered until by a grilling cross-examination of Mr. Halsey it was reluctantly brought out, Mr. Halsey endeavoring by every means to suppress it. (See his testimony, Tr. 121-127.) To show that there is no record of the departure of the applicant, the appellant here, from Hawaii, it appears that the learned Judge referred to the gratuitous statement made by Mr. Halsey on the witness stand, "You will find that the people who made the affidavits are witnesses in the case," for the purpose of showing that the witnesses who appeared before the Secretary of the Territory and testified on the application for the Hawaiian birth certificate are witnesses who appeared before the immigration authorities. This gratuitous fact brought out by Mr. Halsey at his own volition, and not in response to any question asked him, is turned, distorted and twisted to make it a club to be used in preventing the entry of a native-born citizen. It is insisted on the one hand that the report of Merlen J. Moore is a part

of the record. Yet the learned Judge, discussing it in his posthumous opinion, says it was not a part of the record. Yet, at the expense of great effort on the part of petitioner, the fact was brought out from Mr. Halsey that it was sent to the immigration authorities at Washington on appeal and his voluntary statement that it was not considered by the authorities, and such documents are never considered, we regard as of no weight at all. This record teems with evidence showing that records relating to the departure and arrival of different immigrants were considered by the authorities, but not shown to the appellant on his application; that cognizance of the personnel of the witnesses who appeared before the Secretary of the Territory on the application for an Hawaiian birth certificate, criticisms and strictures upon the evidence of witnesses made by Merlen J. Moore, Chinese Inspector, to the Inspector in Charge, all unknown to the appellant, were considered not only by the immigration authorities, but by the learned Judge in his said opinion, we contend is sufficient to establish the unfairness of the hearing given. And the learned Judge in this opinion, written so long after the case had been decided and the appeal perfected, appears to decide as a question of fact whether or not the petitioner was of Hawaiian birth; yet at the hearing, when numerous witnesses are brought to show that he was born in Hawaii, the Judge peremptorily refused to hear them, rejected the offer of proof made to show *aliunde* the record, the Hawaiian birth of the appellant, and yet learnedly argues from certain discrepancies in the testimony as a matter of fact that the appellant was not born in Hawaii. Such procedure before the immigration authorities and before a court might be held

to be a technically "fair hearing," but we doubt if this Honorable Court can, or will, so hold.

The learned trial Judge closes his said opinion with these words: "They serve only to suggest the question whether, even in spite of any unfairness before these officers, the petitioner would be found on a full and fair hearing to be entitled to land." Did he mean by this to admit that the appellant had not had a fair hearing before the immigration officers?

We submit that, upon a careful study of the record in this case, that this is one of the cases coming within the purview of the decisions quoted in this brief and shows specifically that it is one of those cases in which the court should hear the evidence as to the citizenship of the appellant and fairly and justly decide that question.

The immigration and Chinese exclusion Acts were intended to keep cheap Oriental labor out of the United States. They were not intended, as has so often been held by the Courts, to apply to a natural-born citizen, and keep him out of the country. The jurisdiction of the immigration authorities to deport an immigrant who comes here depends upon his being within the excluded classes. They have no jurisdiction in case of a citizen. The fact of citizenship cannot be lightly thrust aside, because the immigrant, native born, does not identify witnesses that he saw last when he was eight or nine years old, and whom he had not seen for something like fourteen years. Human experience should teach any one the futility and injustice of so holding. In the Judge's opinion filed October 13, 1913, he refers (Trans. 152) to the effect of the testimony of Lee Yau and Lee Sau, as shown by the letter of April 2 (Trans. 110, 112),

Merlen J. Moore's report. We submit that this is not a fair criticism of the evidence. Moore (Tr. 111) says that Lee Lau told of seeing appellant in China when he was 4 or 5 years old, and later admits that he never saw him until 1911. We submit that this witness gave no such evidence. That he did testify to seeing appellant in China when appellant was 4 or 5 years old, and did not know him until he came from Hawaii; that he did not play with him until 1910, when he went back to China (Tr. 56-63), and that appellant did not tell him that he (appellant) was born in China until his trip here in 1910 or 1911.

Moore says (Tr. 111) that Lee Lun told a similar story. We submit that this is not true. Lee Lun testified (Tr. 64-69), in substance, that he was born in Sun Chin, China, and lived there until he was 19, when he came to Hawaii; that he first saw appellant when the latter was 4 or 5 years old; that his parents brought him from Hawaii; that witness left China when appellant was 8 or 9 years old; that he saw appellant in Sun Chin, China, when he went back in 1910; that he saw the parents of appellant when they arrived with appellant in China, and that they came to the village of Sun Chin in a small boat.

Moore comments (Tr. 111) upon the fact that the witness Lee Sau testified to knowing appellant and his family in China, and visiting them often, and that this witness picked out the appellant at the detention shed, and identified him, and that the appellant was unable to identify the witness. This witness says that appellant was four years old when he came to China from Hawaii; that four years after witness came to Hawaii and stayed until 1908, when he went back to China, and saw appellant and recognized him. Appellant was unable to identify the

witness, but said, "It seems to me that I saw him in the village."

Moore also criticizes the evidence of Lee King (Tr. 112), who testified to having seen appellant in Hawaii when he was 3 or 4 years old, and to knowing appellant in Hawaii for about a year before his parents took him back to China, and to the fact that he did not recognize appellant in 1908 or 1909 when witness went back again to China, but was told who he was by his parents. This fact does not discredit the witness. A boy 13 years old meets another boy 3 years old; and when the latter is 4 years old he goes away, and they meet something like 17 years later and the older one fails to recognize the younger one. Would either of the Honorable Judges of this court do differently under similar circumstances? (Tr. 75-80.)

Mr. Halsey, while testifying, when asked if he read certain documents—reports of Merlen J. Moore, for instance—would say, "I considered the record; I examined the record," etc. It would be unnatural, and perhaps improbable, for the Inspector in Charge to read the voluminous transcript of the evidence in all of the hundreds of cases coming under his supervision. Why was such a detailed report, and purported synopsis of the testimony, given by the Chinese Inspector, Moore, unless it be to reduce the labor of the Inspector in Charge and furnish the basis for the decision?

We desire to call attention to Act 96 enacted by the Legislature of Hawaii and approved the 17th day of April, A. D. 1911, which is in words and figures as follows, to-wit:

"ACT 96.

AN ACT

TO PROVIDE FOR THE ISSUANCE OF CERTIFICATES OF
HAWAIIAN BIRTH.

*Be it Enacted by the Legislature of the Territory of
Hawaii:*

Section 1. The Secretary of Hawaii may, whenever satisfied that any person was born within the Hawaiian Islands, cause to be issued to such person a certificate showing such fact. The Secretary, with the approval of the Governor, may make such regulations respecting the form of application and certificates, the method of proof, kind of evidence, and time, place and manner of hearing, and all other matters and circumstances connected with such application, proof and hearing as to him may appear necessary, and such regulations, when so approved and published once a week for three consecutive weeks in a newspaper of general circulation published in the Territory, shall have the force of law, and such publication shall be deemed legal notice to all persons. The Secretary may furnish the form of such applications and certificates. All applications shall be by sworn petition, in which the party shall set forth circumstantially all the facts upon which his application rests, and shall be accompanied by sworn affidavits of witnesses. The Secretary and such persons as he may designate and appoint may examine, under oath, any applicant or persons cognizant of the facts regarding any application and for that purpose he and they are hereby authorized and empowered to administer oaths, subpoena and compel the attendance of witnesses and the production of books and papers, punish for contempts and, generally, to exercise the same authority with regard to their special jurisdiction as is by law conferred on District Magistrates.

Section 2. Any applicant or any person, who shall

give or offer any false testimony, oral or written, under oath, in support or respect of any application for a certificate under the provisions of the foregoing Section, shall be deemed guilty of perjury and shall be punishable accordingly.

Section 3. Any certificate of Hawaiian Birth heretofore issued under or by virtue of any law of the Territory, or which may be issued in conformity with the provisions of this Act, shall be *prima facie* evidence of the facts therein stated.

Section 4. A fee of Five Dollars (\$5.00) shall be charged by the Secretary before issuing any such certificate; all such fees received shall be paid by the Secretary to the Treasurer of the Territory, as a government realization.

Section 5. This Act shall take effect from and after the date of its approval."

The Statute provides for the granting of birth certificates by a procedure judicial in its nature, and makes the granting of the certificate *prima facie* evidence of the facts therein stated.

It is certainly a rightful subject of legislation and one granted by Congress in the Organic Act creating the Territory of Hawaii to the Legislature of Hawaii, hence is authorized by sanction of Congress and the provisions of the Statute are entitled to full force. In the absence of any negation of Congress, this Statute stands on the same footing as if it had been enacted by Congress. The courts have no right to ignore, or declare it nugatory. This view is strengthened by Section 906 of the Revised Laws of the United States, which certainly intends to give some force and effect to certificates issued by state and territorial governments. We desire to emphasize further the fact that in the absence of any showing of fraud in procuring the issuance of such cer-

tificate of Hawaiian birth, and in the absence of impeaching testimony, the facts therein stated must be taken as established; that the record is full of evidence sustaining the said certificate and showing that it rightfully issued, and there is no evidence impeaching it whatever. The certificate is not conclusive; no one claims that it is. It does, however, make a *prima facie* case calling for evidence to contradict the facts stated in it, and in the absence of such evidence it must be given full faith and credit in the Federal Courts the same as the territorial courts of Hawaii must give to it. In response to the suggestion or request of the trial judge that both parties file briefs touching the weight to be given to such certificates (Tr. 109), the appellant in this case filed with the trial judge a brief citing and commenting on the said Statute relating to Hawaiian birth certificates and making the same argument made above in relation thereto.

The case of *Williams vs. United States*, 137 U. S. 113, at first glance, probably fails to sustain our view as to the effect of the Hawaiian birth certificate; but, that case is easily distinguished from the case at bar. The gist of the decision in that case is that the State of Virginia could not, by legislative or administrative act, bind the United States Government in a matter over which Congress had exclusive jurisdiction and authority. In that case it was held that the report of the Commissioner of the State of Virginia, approved by the Governor, to the effect that Col. Taylor was entitled to half pay as an officer of the line in the Continental army, was not binding on the United States, especially in the absence of all records showing that he was such officer, and attached to the line, which would be in existence if he was such

officer. In other words, said report was treated as *prima facie*, but not conclusive as evidence, or a judgment against the United States, and subject to impeachment; and the court held that the absence of the records which would exist if the conclusion of the commissioner was correct, was sufficient to overcome it. We claim that that decision is not in point here.

Where one claiming the right to land as an American by birth, like the appellant here, exhibits to the Immigration authorities a certificate showing such birth, issued under the solemn provisions of a positive law, authorized by Congress, unrepealed by Congress, and establishes his identity as the person named in and to whom the certificate issued, he has, under Section 1, Article XIV, of Amendments to the United States Constitution, taken himself out of the jurisdiction of the Immigration authorities, in the absence of positive evidence showing that the facts stated in such certificate are not true. The production of the certificate shifts the burden upon the government, whose officers cannot keep an American citizen from landing. Here there is no question of the identity of the appellant as the person to whom said certificate issued, but his identity is admitted. He must, therefore, until the facts stated in the Hawaiian Birth Certificate are disproved by positive evidence, be treated as an American citizen by birth; and, it must be held that the Immigration authorities have no jurisdiction over him or power to prevent his landing or to order his deportation.

We submit upon the record, that appellant was, contrary to law, denied a landing; that he is a citizen; that he does not belong to any excluded class of aliens; that the return was insufficient, and in the face of his claim of citizenship, and Hawaiian Birth

Certificate, failing, as it did, to state positively and affirmatively any fact showing that appellant belongs to one of the classes of persons excluded from entry, the exceptions to said return should have been sustained, and the appellant should have been discharged, unless a further return had been made showing just cause of detention. We submit that the gist of the return is this: We, the immigration authorities, are not certain that appellant is a citizen; we do not say that he was not born in Hawaii, but we do say that if he was born in Hawaii, his absence from Hawaii, with his parents, since 1892, works an abandonment of his citizenship; that we fairly heard your evidence, but a fair hearing does not include a fair decision upon the evidence, and that we are a power unto ourselves, beyond and above the power of any court, and what we say must be obeyed.

We submit that the judgment appealed from should be reversed, and the cause remanded with instructions to the District Court to discharge the appellant from custody on the ground of his citizenship.

Respectfully,

ANDREWS & QUARLES,
Attorneys for Appellant.

GEORGE S. CURRY, Esq., and
JAMES A. BALLENTYNE, Esq.,
Of Counsel.

United States
Circuit Court of Appeals

For the Ninth Circuit.

NORTHERN PACIFIC RAILWAY COMPANY, a
Corporation,

Plaintiff in Error,

vs.

UNITED STATES OF AMERICA,

Defendant in Error.

Transcript of Record.

Upon Writ of Error to the United States District Court
of the District of Montana.

FILED

DEC 31 1913

No. 2343

United States
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Names and Addresses of Attorneys of Record.

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Special Assistant to the Attorney General, of
Washington, D. C.,

Attorneys for Plaintiff and Defendant in
Error.

Messrs. GUNN, RASCH & HALL, of Helena, Mon-
tana,

Attorneys for Defendant and Plaintiff in
Error. [1*]

*In the District Court of the United States, District
of Montana.*

No. 276.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

NORTHERN PACIFIC RAILWAY COMPANY, a
Corporation,

Defendant.

BE IT REMEMBERED, that on the 10th day of
September, 1912, plaintiff filed its complaint herein
in the words and figures following, to wit: [2]

*Page number appearing at foot of page of original certified Record.

*In the District Court of the United States, District
of Montana.*

UNITED STATES OF AMERICA,

Plaintiff,

vs.

NORTHERN PACIFIC RAILWAY COMPANY, a
Corporation,

Defendant.

Complaint.

Now comes the United States of America, by James W. Freeman, United States Attorney for the District of Montana, and S. C. Ford, Assistant United States Attorney for the District of Montana, and brings this action on behalf of the United States against the Northern Pacific Railway Company, a corporation organized and doing business under the laws of the State of Wisconsin, and having an office and place of business at Missoula, in the State of Montana; this action being brought upon suggestion of the Attorney General of the United States at the request of the Interstate Commerce Commission, and upon information furnished by said Commission.

I.

For a first cause of action against said defendant, plaintiff complains and alleges:

1. That said defendant is, and was during all the times mentioned herein, a common carrier engaged in interstate commerce by railroad in the State of Montana.

2. Plaintiff further alleges that in violation of

the Act of Congress, known as "An Act to promote the safety of employees and travelers upon railroads by limiting the hours of service of employees thereon," approved March 4, 1907 (contained in 34 Statutes at Large, page 1415), said defendant, beginning at the hour of 10:00 o'clock P. M. on May 1, 1912, upon its line of railroad [3] at and between the stations of Missoula, in the State of Montana, and Avon, in said State, within the jurisdiction of this Court, required and permitted its certain fireman and employee, to wit, B. D. Drew, to be and remain on duty as such for a longer period than sixteen consecutive hours, to wit, from said hour of 10:00 o'clock P. M. on said date to the hour of 10:30 o'clock P. M. on May 2, 1912.

3. Plaintiff further alleges that said employee, while required and permitted to be and remain on duty as aforesaid, was engaged in and connected with the movement of said defendant's train No. Extra, drawn by its own locomotive engine No. 1654, said train being then and there engaged in the movement of interstate traffic.

4. Plaintiff further alleges that by reason of the violation of said Act of Congress, said defendant is liable to plaintiff in the sum of five hundred dollars.

II.

For a second and further cause of action against said defendant, plaintiff complains and alleges:

1. That said defendant is, and was during all the times mentioned herein, a common carrier engaged in interstate commerce by railroad in the State of Montana.

2. Plaintiff further alleges that in violation of the Act of Congress, known as "An Act to promote the safety of employees and travelers upon railroads by limiting the hours of service of employees thereon," approved March 4, 1907 (contained in 34 Statutes at Large, page 1415), said defendant, beginning at the hour of 3:40 o'clock P. M. on May 1, 1912, upon its line of railroad at and between the stations of Missoula, in the State of Montana, and Elliston, in said State, within the jurisdiction of this Court, required and permitted its certain fireman and employee, to wit, V. Jenson, to be and remain on duty as such [4] for a longer period than sixteen consecutive hours, to wit, from said hour of 3:40 o'clock P. M. on said date to the hour of 4:00 o'clock P. M. on May 2, 1912.

3. Plaintiff further alleges that said employee, while required and permitted to be and remain on duty as aforesaid, was engaged in and connected with the movement of said defendant's train No. Extra, drawn by its own locomotive engine No. 1633, said train being then and there engaged in the movement of interstate traffic.

4. Plaintiff further alleges that by reason of the violation of said Act of Congress, said defendant is liable to plaintiff in the sum of five hundred dollars.

WHEREFORE, plaintiff prays judgment against said defendant in the sum of one thousand dollars and its costs herein expended.

JAS. W. FREEMAN,

United States Attorney, District of Montana.

S. C. FORD,

Assistant U. S. Attorney, District of Montana. [5]

United States of America,
District of Montana,—ss.

S. C. Ford, being first duly sworn, deposes and says: That he is the duly appointed, qualified and acting United States Attorney for the District of Montana; that he has read the foregoing complaint and knows the contents thereof, and that the matters and things therein stated are true to the best of his knowledge, information and belief.

S. C. FORD.

Subscribed and sworn to before me this 10th day of Sept., 1912.

[Seal]

GEO. W. SPROULE,

Clerk U. S. District Court, District of Montana.

By C. R. Garlow,

Deputy Clerk.

Filed Sept. 10, 1912. Geo. W. Sproule, Clerk.
[6]

Thereafter, on September 10, 1912, summons was duly issued herein in the words and figures following, to wit: [7]

[Summons.]

UNITED STATES OF AMERICA.

*District Court of the United States, District of
Montana.*

UNITED STATES OF AMERICA,

Plaintiff,

vs.

NORTHERN PACIFIC RAILWAY COMPANY,
a Corporation,

Defendant.

Action brought in the said District Court, and the Complaint filed in the office of the Clerk of said District Court, in the City of Helena, County of Lewis and Clark.

The President of the United States of America,
Greeting: To the Above-named Defendant,
Northern Pacific Railway Company, a Corporation.

You are hereby summoned to answer the complaint in this action which is filed in the office of the Clerk of this Court, a copy of which is herewith served upon you, and to file your answer and serve a copy thereof upon the plaintiff's attorney within twenty days after the service of this summons, exclusive of the day of service; and in case of your failure to appear or answer, judgment will be taken against you by default, for the relief demanded in the complaint.

Witness, the Honorable GEO. M. BOURQUIN,
Judge of the United States District Court, District of Montana, this 10th day of September, in the year of our Lord one thousand nine hundred and twelve, and of our independence the 137th.

[Seal]

GEO. W. SPROULE,
Clerk.

By C. R. Garlow,
Deputy Clerk. [8]

United States Marshal's Office,
District of Montana.

I hereby certify, that I received the within summons on the 10th day of September, 1912, and per-

sonally served the same on the 10th day of September, 1912, on Northern Pacific Railway Company, a corporation, by delivering to, and leaving with M. S. Gunn, Statutory Agent and Attorney for said defendant named therein personally, at Helena, County of Lewis & Clark, in said District, a certified copy thereof, together with a copy of the complaint, certified to by Clerk U. S. District Court attached thereto.

Dated this 10th day of September, 1912.

WILLIAM LINDSAY,
U. S. Marshal.
By Jas. A. Gillan,
Deputy.

[Endorsed]: No. 276. U. S. District Court, District of Montana. United States vs. Nor. Pac. Ry. Co. Summons. J. W. Freeman, Plaintiff's Attorney, Helena, Mont. Filed Sept. 10th, 1912. Geo. W. Sproule, Clerk. By C. R. Garlow, Deputy Clerk.
[9]

Thereafter, on September 30, 1912, demurrer was filed herein in the words and figures following, to wit: [10]

In the District Court of the United States, District of Montana.

Case No. 276.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

NORTHERN PACIFIC RAILWAY CO., a Corporation,

Defendant.

Demurrer.

Now comes the defendant Northern Pacific Railway Company in said above-entitled cause and demurs to the first cause of action set forth in plaintiff's complaint on file herein upon the ground and for the reason:

1. That the said first cause of action set forth in plaintiff's complaint does not state facts sufficient to constitute a cause of action against this defendant.

And the said defendant, Northern Pacific Railway Company, demurs to the second cause of action set forth in plaintiff's complaint upon the ground and for the reason:

1. That the said second cause of action set forth in plaintiff's complaint does not state facts sufficient to constitute a cause of action against this defendant.

GUNN, RASCH & HALL,
Attorneys for Defendant.

Service of the within demurrer admitted and receipt of copy thereof acknowledged this 30th day of Sept., 1912.

J. W. FREEMAN,
Attorney for Plff.

Filed Sept. 30, 1912. Geo. W. Sproule, Clerk.
By C. R. Garlow, Deputy. [11]

[Order Overruling Demurrer, etc.]

Thereafter, on December 10, 1912, an order was made overruling the demurrer herein in the words and figures following, to wit:

In the District Court of the United States, District of Montana.

No. 276.

UNITED STATES

vs.

NORTHERN PACIFIC RAILWAY CO.

On motion of defendant, demurrer overruled and defendant granted 30 days to answer.

Entered, in open court, December 10, 1912. Geo. W. Sproule, Clerk. [12]

Thereafter, on January 31, 1913, answer was filed herein in the words and figures following, to wit:
[13]

In the District Court of the United States, District of Montana.

No. 276.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

NORTHERN PACIFIC RAILWAY COMPANY, a
Corporation,

Defendant.

Answer.

Now comes the defendant, Northern Pacific Railway Company, in said above-entitled cause, and for answer to the first cause of action of plaintiff's complaint herein:

1. Admits the allegations of paragraph 1 of the first cause of action set forth in plaintiff's complaint.

2. Denies each and every other allegation contained in said first cause of action of plaintiff's complaint.

And for further answer, and as a separate defense to said first cause of action of plaintiff's complaint, defendant alleges:

1. That the said train Extra No. 1634 east, on which said B. D. Drew was serving as fireman, left the City of Missoula, Montana, a district terminal on said defendant company's line of railroad, for the city of Helena, Montana, a division terminal on said line of road, at the hour of about 10:45 o'clock P. M. on said first day of May, 1912, and that under ordinary conditions, and according to schedule time, the run of said train from Missoula to Helena should, and could, have been made within from thirteen to fourteen hours from the time of departure, when said fireman would have been relieved from duty. That the said train arrived at the station of Avon, Montana, at the [14] hour of 11:02 o'clock A. M. on May 2, 1912, and was held there after such arrival, with the train crew, including said fireman Drew, on duty, until 1:15 P. M. of said day, at which time the said crew, including said fireman Drew,

had been on duty, engaged in, and connected with, the movement of said train a period of fifteen hours and thirty minutes. That after said train had proceeded eastward from the said city of Missoula, with but fifteen minutes' delay as far as Drummond, Montana, it encountered at, or immediately east of, Drummond, storms and snowfall of such unusual and unprecedented violence and severity that when said train arrived at said station of Avon the telegraph and telephone lines in both directions east and west had been broken and torn down, completely destroying and cutting off all means of communication with the operators and dispatchers at the stations of said defendant company in both directions from said station of Avon. That snow to the depth of fifteen inches had fallen, and was packed down upon said defendant company's railroad tracks, which fact, together with the fact that no means of communication were available in either direction from said station of Avon, made it impossible to proceed with said train, and the same was left at said station, and the crew of said train, including the said fireman, B. D. Drew, taken off and relieved from duty, after having been on duty, engaged in, and in connection with, the movement of said train but fifteen hours and thirty minutes, and no more. That thereafter the said B. D. Drew was not on duty on any part or portion of said second day of May, 1912, as a fireman, or in any other capacity engaged in, or connected with, the movement of said train, or any other train of said defendant company, but was merely watching and guarding the

engine of said train while said train so remained tied up and standing still at said station of Avon, on account of the conditions which existed, and which made any movement of said train [15] impossible. That no other person than the said B. D. Drew, competent and qualified to watch and look after said engine, while the same was standing still, was available for that purpose. And defendant alleges that the delay in the movement of said train, and the necessity for the watching and guarding of said engine by said B. D. Drew, were occasioned by, and due to, the act of God, and the result of causes which were not known to the said defendant company, or its officers, or agents in charge of said B. D. Drew at the time said B. D. Drew left said terminal at Missoula, and which could not have been foreseen.

And for answer to the second cause of action of plaintiff's complaint defendant:

1. Admits the allegations of paragraph 1 of said second cause of action of plaintiff's complaint.

2. Denies each and every other allegation contained in said second cause of action set forth in plaintiff's complaint.

And for further answer, and as a separate defense to said second cause of action of plaintiff's complaint, defendant alleges:

1. That the said train, Extra No. 1633, on which said V. Jenson was serving as a fireman, left the city of Missoula, Montana, a district terminal on said defendant company's line of railroad, for the city of Helena, Montana, a division terminal on said line of road, at the hour of 3:40 P. M. on said first day of

May, 1912, and that under ordinary conditions the run of said train from Missoula to Helena should, and could, have been made within from thirteen to fourteen hours after departure, when said fireman would have been relieved from duty. That the said train arrived at the station of Elliston, Montana, at the hour of 7:00 A. M. on May 2, 1912, at which time the said crew, including said fireman Jenson, had been on duty a period of fifteen hours and twenty minutes. That after said train had proceeded eastward from the city of Missoula, with but little [16] delay as far as Drummond, Montana, it encountered at, or immediately east of, Drummond, storms and snowfall of such unusual and unprecedented violence and severity, that when said train arrived at said station of Elliston the telegraph and telephone lines had been broken and torn down, both to the east and west of said station of Elliston, completely destroying and cutting off all means of communication with the operators and dispatchers at the station of said defendant company, in both directions from said station of Elliston. That snow to the depth of eighteen inches had fallen, and was packed down upon defendant company's railroad track, which fact, together with the fact that no means of communication in either direction from said station of Elliston were available, made it impossible to proceed with said train, and the same was left standing at said station of Elliston, and the crew of said train, including the said fireman, V. Jenson, taken off and relieved from further duty, after having been on duty, engaged in, and in con-

nection with, the movement of said train but fifteen hours and twenty minutes, and no more. That thereafter the said V. Jenson was not on duty on any part or portion of said second day of May, 1912, as a fireman, or in any other capacity engaged in, or connected with, the movement of said train, or any other train, of said defendant company, but was merely watching and guarding the engine of said train while the said train remained so tied up and standing still at said station of Elliston on account of the conditions which existed, and which made any movement of said train impossible. That no other person than the said V. Jenson, competent and qualified to watch and look after said engine while the same was standing still, was available for that purpose. And defendant alleges that the delay in the movement of said train, and the necessity for the watching and guarding of said engine by said V. Jenson, were due to the act of God and the result of causes which were [17] not known to said defendant company, its officers, or agents, in charge of said V. Jenson at the time said V. Jenson left said terminal at Missoula, and which could not have been foreseen.

WHEREFORE, having fully answered the plaintiff's complaint, defendant prays judgment that the said action be dismissed.

GUNN, RASCH & HALL,

Attorneys for Defendant.

State of Montana,

County of Lewis and Clark,—ss.

Carl Rasch, being first duly sworn, deposes and

says: That he is an officer of the defendant Railway Company, to wit, one of its Division Counsel for the State of Montana, and makes this verification in said defendant's behalf; that he has read the foregoing answer to plaintiff's complaint, and knows the contents thereof, and that the same is true to the best of affiant's knowledge, information and belief.

CARL RASCH.

Subscribed and sworn to before me this 30th day of January, 1913.

[Seal]

W. W. PATTERSON,
Notary Public for the State of Montana, Residing at
Helena, Montana.

My commission expires May 6, 1914.

Due personal service of within answer made and admitted and receipt of copy acknowledged this 31st day of Jany., 1913.

J. W. FREEMAN,
Attorney for Plaintiff.

Filed Jan. 31, 1913. Geo. W. Sproule, Clerk.
[18]

Thereafter, on June 27, 1913, the verdict of the jury was rendered and entered herein, in the words and figures following, to wit:

*In the District Court of the United States in and for
the District of Montana.*

UNITED STATES OF AMERICA,

Plaintiff,

vs.

NORTHERN PACIFIC RAILWAY COMPANY, a
Corporation,

Defendant.

Verdict.

We, the jury in the above-entitled cause, find for the plaintiff and against the defendant on the two causes of action set forth in the complaint.

JOHN W. WADE,

Foreman.

Filed June 27th, 1913. Geo. W. Sproule, Clerk.
By C. R. Garlow, Deputy. [19]

Thereafter, on June 27, 1913, judgment was duly rendered and entered herein, in the words and figures following, to wit:

*In the District Court of the United States, District
of Montana.*

UNITED STATES OF AMERICA,

Plaintiff,

vs.

NORTHERN PACIFIC RAILWAY COMPANY, a
Corporation,

Defendant.

Judgment.

This cause came on regularly for trial on the 26th day of June, A. D. 1913, James W. Freeman, United States Attorney, and Walter N. Brown, Special Assistant to the Attorney General, appearing on behalf of the United States, and Messrs. Gunn, Rasch & Hall appearing on behalf of said defendant. Where-

upon a jury of twelve men were regularly impanelled and sworn to try said action. Witnesses on the part of the plaintiff and defendant were sworn and examined, and after hearing the evidence and argument of counsel and the instructions of the Court, on the 27th day of June, A. D. 1913, the jury retired to consider their verdict, and subsequently returned into court and do say that they find a verdict for the plaintiff and against said defendant on the two causes of action set forth in the complaint on file herein; and thereupon it was by the Court ordered that judgment be entered against said defendant and in favor of the plaintiff in the sum of one hundred dollars upon each of the two causes of action set forth in said complaint.

WHEREFORE, by virtue of the law and by reason of the [20] premises aforesaid,

IT IS ORDERED and ADJUDGED that said plaintiff do have and recover from said defendant the sum of two hundred dollars, together with its costs and disbursements incurred in this action taxed in the sum of \$143.05.

Judgment rendered and entered this 27th day of June, A. D. 1913.

GEO. W. SPROULE,
Clerk.

Attest a true copy:

GEO. W. SPROULE,
Clerk.

United States of America,
District of Montana,—ss.

I, Geo. W. Sproule, Clerk of the United States

District Court for the District of Montana, do hereby certify that the foregoing papers hereto annexed constitute the Judgment-roll in the above-entitled action.

Witness my hand and the seal of said court at Helena, Montana, this 27th day of June, A. D. 1913.

[Seal]

GEO. W. SPROULE,
Clerk.

[Indorsed]: No. 276. Title of Court and Cause. Judgment-roll. Filed June 27th, 1913. Geo. W. Sproule, Clerk. [21]

Thereafter, on September 24, 1913, defendant's bill of exceptions was duly settled and allowed and filed herein being in the words and figures following, to wit: [22]

In the District Court of the United States, District of Montana.

No. 276.

THE UNITED STATES OF AMERICA,
Plaintiff,

vs.

NORTHERN PACIFIC RAILWAY COMPANY,
a Corporation,

Defendant.

Bill of Exceptions.

APPEARANCES:

JAMES W. FREEMAN, United States District
Attorney,

WALTER N. BROWN, Special Assistant to the
Attorney General, Attorneys for Plaintiff.

Messrs. GUNN, RASCH & HALL, Attorneys for
Defendant. [23]

*In the District Court of the United States for the
District of Montana.*

No. 276.

THE UNITED STATES OF AMERICA,

Plaintiff,

vs.

NORTHERN PACIFIC RAILWAY COMPANY,
a Corporation,

Defendant.

Bill of Exceptions.

BE IT REMEMBERED: That the above-entitled cause came on regularly for trial before the above-entitled court, and a jury duly empanelled and sworn to try said cause, on the 26th day of June, 1913, upon the pleadings filed in said cause. James W. Freeman, United States District Attorney, and Walter N. Brown, Special Assistant to the Attorney General, appearing on behalf of the United States, and Messrs. Gunn, Rasch & Hall appearing on behalf of said defendant.

WHEREUPON the following proceedings were had and testimony introduced:

The following stipulation was made and filed in said cause, to wit:

(Title of Court and Cause.)

Stipulation [Re Facts].

Now come the plaintiff and the defendant in the above-entitled cause, by their respective attorneys, and, in order to facilitate the trial of same, hereby stipulate that the following facts are hereby conceded and admitted to be true in all particulars and are hereby submitted with the same force and effect as if proven upon the trial of said cause.

The defendant is a corporation organized and doing business [24] under the laws of the State of Wisconsin, and having an office and place of business at Missoula, Montana; it is, and was during all the times mentioned in plaintiff's complaint, a common carrier engaged in interstate commerce by railroad in the State of Montana.

FIRST CAUSE OF ACTION.

The defendant, on May 1 and 2, 1912, operated on its line of railroad, at and between the stations of Missoula, Montana, and Avon, Montana, its certain freight train known as Extra No. 1654 East, drawn by its locomotive engine No. 1654, said train being at all times engaged in the movement of interstate traffic.

Defendant, on above dates, required and permitted its fireman and employee, B. D. Drew, to be and remain on duty and engaged in and connected with the movement of said train as follows:

Train Extra No. 1654 East was scheduled to leave

Missoula, Montana, at 10:45 P. M. on May 1, 1912. Under the rules of said defendant company fireman Drew was required to and did report for duty 45 minutes prior to the time set for the departure of said train, or at 10:00 P. M. on May 1, 1912.

Train Extra No. 1654 East actually left Missoula, Montana, at 11:00 P. M. on May 1, 1912, and proceeded in an easterly direction towards Helena, Montana. It arrived at Avon, Montana, which is about 38 miles west of Helena, Montana, at 11:00 A. M. May 2, 1912, and was held there after such arrival with the train crew, including said fireman Drew, until 1:15 P. M. of said day, and the crew, with the exception of said fireman Drew, was then and there relieved from all duty in connection with said train on account of the so-called Federal Sixteen-hour Law, but said fireman Drew was required to remain and did remain in attendance upon the engine of said train as a watchman of said engine until 10:30 P. M. on May 2, 1912.

From 10:00 P. M. on May 1, 1912, to 10:45 P. M. on said date, fireman Drew was engaged in the preliminary work necessary to the preparation of said engine No. 1654 and train Extra No. 1654 East for [25] service, as required by defendant's rules.

From 10:45 P. M. on May 1, 1912, to 1:15 P. M. on May 2, 1912, fireman Drew was engaged in and connected with the actual physical movement of said train from Missoula, Montana, to Avon, Montana, in the capacity of locomotive fireman.

From 10:00 P. M. on May 1, 1912, to 1:15 P. M. on May 2, 1912, fireman Drew was not released from

duty, but was at all times performing service or held responsible for the performance of service in connection with the movement of said train.

At 1:15 P. M. on May 2, 1912, fireman Drew was relieved from all work in connection with the actual physical movement of said train, but was required and permitted to remain on said engine in the capacity of watchman from 1:15 P. M. on May 2, 1912, to 10:30 P. M. on said date. His duty, as watchman, was to keep up a small fire in the engine, so as to generate sufficient steam to pump water into the boiler to prevent the water from getting below the level of the crown sheet; to pump such water into the boiler when necessary for such purpose; and to prevent the engine from becoming dead.

SECOND CAUSE OF ACTION.

The defendant, on May 1 and 2, 1912, operated on its line of railroad, at and between the stations of Missoula, Montana, and Elliston, Montana, its certain freight train known as Extra No. 1633 East, drawn by its locomotive engine No. 1633, said train being at all times engaged in the movement of interstate traffic.

Defendant, on above dates, required and permitted its fireman and employee, V. Jenson, to be and remain on duty and engaged in and connected with the movement of said train as follows:

Train Extra No. 1633 East was scheduled to leave Missoula, Montana, at 4:25 P. M. on May 1, 1912. Under the rules of said defendant company fireman Jenson was required to and did report for duty 45 minutes prior to the time set for the departure of

said train, or at 3:40 P. M. on May 1, 1912.

Train Extra No. 1633 East actually left Missoula, Montana, at [26] 4:25 P. M. on May 1, 1912, and proceeded in an easterly direction toward Helena, Montana. It arrived at Elliston, Montana, which is about 29 miles west of Helena, Montana, at 7:00 A. M. on May 2, 1912, and the train crew, with the exception of said fireman Jenson, was then and there relieved from all work in connection with said train on account of the so-called Federal Sixteen-hour Law, but said fireman Jenson was required to remain and did remain in attendance upon the engine of said train as a watchman of said engine until 4:00 P. M. on May 2, 1912.

From 3:40 P. M. on May 1, 1912, to 4:25 P. M. on said date, fireman Jenson was engaged in the preliminary work necessary to the preparation of said engine No. 1633 and train Extra No. 1633 East for service, as required by defendant's rules.

From 4:25 P. M. on May 1, 1912, to 7:00 A. M. on May 2, 1912, fireman Jenson was engaged in and connected with the actual physical movement of said train from Missoula, Montana, to Elliston, Montana, in the capacity of locomotive fireman.

From 3:40 P. M. on May 1, 1912, to 7:00 A. M. on May 2, 1912, fireman Jenson was not released from duty, but was at all times performing service or held responsible for the performance of service in connection with the movement of said train.

At 7:00 A. M. on May 2, 1912, fireman Jenson was relieved from all work in connection with the actual physical movement of said train, but was required

and permitted to remain on said engine in the capacity of watchman from 7:00 A. M. on May 2, 1912, to 4:00 P. M. on said date. His duty, as watchman, was to keep up a small fire in the engine, so as to generate sufficient steam to pump water into the boiler to prevent the water from getting below the level of the crown sheet; to pump such water into the boiler when necessary for such purpose; and to prevent the engine from becoming dead.

Dated Helena, Montana, June 26, 1913. [27]

JAMES W. FREEMAN,

United States Attorney.

WALTER N. BROWN,

Special Assistant United States Attorney.

GUNN, RASCH & HALL,

Attorneys for Defendant.

Upon reading the foregoing stipulation to the jury the plaintiff rested.

Whereupon the defendant introduced the following testimony, in substance.

[Testimony of P. L. Gies, for Defendant.]

P. L. GIES, a witness called in behalf of the defendant, being first duly sworn, testified as follows:

Direct Examination by Mr. HALL.

My name is P. L. Gies. I live at Missoula, Montana. I am working at the present time for the Northern Pacific Railway Company, in the capacity of locomotive engineer. I was working on the first and second days of May, 1912, on Extra 1654 East from Missoula to Helena, as engineer. I just don't remember the time Extra 1654 left, but it was in the

(Testimony of P. L. Gies.)

night, before midnight sometime. I cannot remember how the conditions were there as to the weather. There was no unusual conditions that I recall. Where I remember of having first encountered snow was between Bearmouth and Drummond. Starting from Missoula, the town I came to first was Bearmouth and then Drummond. And after that I came to Garrison. Avon is east of Garrison and Elliston is east of Avon. It was early in the morning when I got to Bearmouth. The first time I remember seeing snow; that is, to notice it, was east of Drummond. At that place the snow was deep and heavy and wet; that is, it appeared that way. The wires were down in several places I noticed, and also the poles. That was caused by the snow. There was snow hanging on the wires and lots of it. I have been working on the railroad, on the Rocky Mountain Division about thirteen years. The Rocky Mountain Division is that branch of the road from Helena to Missoula, and west to Paradise. I think this snowstorm that I [28] encountered that night, was an extraordinary storm. I never noticed any storm at that time of the year of that nature. At Avon, if I remember right, it was over my shoe-tops. There was about eight or nine inches of snow. I got to Avon in the forenoon about eleven o'clock. I got to Avon—after I got to Avon the train tied up and the crew was relieved at 1:15 P. M. The reason we didn't get through before that time—we went to Avon for No. 3 and there was a flagman came there and laid us off for an extra west. We were tied up then. When

(Testimony of P. L. Gies.)

we were tied up the train crew, including myself, went into the caboose and the fireman watched the engine. The fireman's duty is to keep sufficient water in the boiler to avoid burning it, and sufficient steam to work the injector or to put water into the boiler. That is what the injector is for. This injector is used to pump water from the tank of the engine into the boiler. He is also to keep the engine from freezing up, the parts that were liable to freeze in cold weather. As to his having any duties with reference to the movement of the train during the time he was acting as watchman, they don't move the engine at all. He must keep the water over the fire-box, keep enough water in it, sufficient water over the crown-sheet to prevent the engine from burning. If there isn't any water in the engine, you couldn't do nothing with the engine, it would be useless. Before you could again use it, it would have to be brought some place to have the boiler refilled and the fire started. The boiler in that kind of an engine could not be refilled out there if the water got below the crown-sheet. You couldn't put any water in it; you would have no way of putting any in there. There are no facilities around that place for filling the boiler. Even if the water didn't get below the crown-sheet and the fire should be allowed to go out entirely, it would take a new crew to operate that engine and get up steam, about an hour and a half, if the engine was there seven or eight hours. If a little fire was kept up, and steam sufficient to work the injector it wouldn't take [29] at most thirty

(Testimony of P. L. Gies.)

minutes to start the engine up. If this train was tied up and they allowed the fire to go out during that time, there would be the likelihood of the water, during the next eight hours getting below the crown-sheet, if there was no pumping done. It would be liable to get below it. The crew that took this engine and train out after it was tied up was conductor Shaw and his brakeman and myself and fireman Daly. Fireman Drew dead-headed into Helena, I believe. The name of the fireman who accompanied me when I took the train out after the tie-up was John Daly.

Cross-examination by Mr. BROWN.

Just what were the weather conditions when I left Missoula—it was night-time and I didn't pay any attention. I couldn't say whether it was snowing or not when we left Missoula. I rather think it wasn't; I have a very faint recollection of the trip from Missoula to Bearmouth, or west of Bearmouth. I recall where I first encountered this heavy snow. It was just east of Bearmouth. Of course, I know there was snow between Bearmouth and Drummond; but the reason I thought it was heavy was because the poles were down and the wires down east of Drummond. I didn't notice any poles down up to the time I got to Drummond. I was not delayed materially up to the time I got to Drummond, by reason of this storm. I have been in the service of the Rocky Mountain Division for thirteen years; but nine years an engineer. All that length of time I worked on the Rocky Mountain Division. I never

(Testimony of P. L. Gies.)

saw a snowstorm like this before. I have seen lots more snow than that at other times of the year, and at other places on the division. It is not usual in the spring of the year to have this heavy, clammy snow. I never noticed any snow like that, at that time of the year. I cannot just recall whether I have noticed snow in May or not. I couldn't testify that I never did see snow in May. I don't remember two or three years ago when there was two or three feet of snow all over Montana. When I got to Avon the snow was eight or nine inches deep. The snow wasn't of sufficient depth [30] to prevent the physical movement of that train. The ordinary running time for a train of that size from Missoula to Helena is, ordinarily, about, I should judge, fourteen hours. From Missoula to Helena is one hundred and twenty miles. To go from Drummond to Garrison, I don't know just how long it did take us. Engine 1654 was Class W. I don't remember how many loads I had on that train. The tonnage rating of that engine between Missoula and Garrison at one time was twenty-four hundred tons. I do not know what the tonnage rating was at this time. The tonnage rating from Garrison to Elliston would be the same as I understand it, as it would be from Missoula to Elliston. That is, we handle them out of there with two engines. But I don't know just what their rating was. I had the usual train; about eleven A. M. I reached Avon and was held there until 1:15 P. M. The reason we were held at Avon was because a flagman came on Number 3 and told us to stay there

(Testimony of P. L. Gies.)

until an extra west arrived. If I remember right we went to Avon on No. 3's carded time, and we waited there in the clear for No. 3 to go by. We got an order from No. 3 to wait there for another train which was coming, with instructions from the flagman, signed by the conductor of No. 3 for us to remain there until this extra west arrived there. If we hadn't had to wait for this other train coming there we could have made the terminal of Helena with the engine and caboose. By leaving the train there and taking the engine and caboose and the train crew we could have made Helena within that time. I don't remember at what time that extra came along, but it must have been close to that time. I think it was before we tied up. At any rate, if I remember correctly, they came there too late for us to make Helena with the caboose. Ordinarily, we would have made Helena. We started out with the intention of going to Helena. I mean when we started on our trip from Missoula that was the intention of this train. Ordinarily we would have made it; we would have made it if we hadn't been detained there. I don't know that it is usual to go [31] in light under these circumstances, where it is possible to get in within sixteen hours. I have done it at times; and I haven't done it. I have received orders to do that. I have done it lots of times. The first poles and wires down that I noticed, as near as I can remember, was about two miles east of Drummond,—two miles and a half that the poles were not in an upright position; they were leaning over. I saw them

(Testimony of P. L. Gies.)

down as I went along; I didn't pay much attention to it. I have seen wires down before on account of storms. The only place I believe I have seen it is at Wallace, over between the Coeur d'Alene and Wallace. Over there the snow is pretty deep. When I got to Avon at eleven A. M. I didn't communicate with the dispatcher. I couldn't tell whether the wire was working at Avon or not. I cannot just remember whether I got a message or not; if I did I got it through the conductor. Handed to me by the fireman. But I cannot remember handling any message. It don't seem clear any more; I presume there was one likely. It is customary to receive a message to tie up. I have always been tied up with a message. I did not know of any trains passing while we were there at Avon. Of course we met Number 3, and an extra west I believe; I ain't sure about that though. I think we did meet an extra west but I don't remember of any trains going the other way. Myself and the rest of the crew were tied up, with the exception of Fireman Drew. The result would be, if the water should become too low in that boiler, and a fire in the fire-box, to burn the engine. If the crown-sheet became heated it might possibly cause an explosion, under some conditions it would. We would ordinarily have a small amount of steam; while he was watching her you know. It was possible to have killed that engine there. If that engine had been killed and the fire been put out of that engine, Fireman Drew could have been relieved, and he would have had no work to perform. It takes an hour and a

(Testimony of P. L. Gies.)

half to build the fire. If you had everything convenient and handy the same as he would have at the roundhouse. [32] We have no supplies in the engine to build a fire with. We carried no wood, or anything like that. After I reported for duty again, another fireman was sent to take the place of Fireman Drew. I don't know how he got there; I know he fired the engine for me out of that town. Of course, he was sent there from somewhere, I don't know where he came from. They maintain at Garrison, at different times, different numbers of train crews. I would say there are four or five. They maintain helper crews there, and they have engines there. If one of these firemen was sent down from Garrison, I suppose it would have been possible to have sent down a new engine, to relieve our crew which was stationed up there at Avon, but they didn't have any road engines at this station of Garrison to take the place of the road engine I was running; that is they don't keep them there. From Helena to Avon is about twenty-eight miles. They keep engines there. It would have been possible to have sent an engine from Helena to relieve this crew, if they had them. It is a terminal. Outside of the mere inconvenience and delay caused by rebuilding this fire and keeping water in the engine, this engine could have been killed there at Avon and the fireman could have been entirely relieved; but the cold weather, you have to arrange for that.

Redirect Examination by Mr. HALL.

Q. Well, how do the snowstorms during the winter months, when there is a heavy fall of snow, affect

(Testimony of P. L. Gies.)

the movement of the train and the wires, as compared with the snow that you saw there in May?

A. Well, the winter snows are more dry. The snow falls on them and falls off; while the wet snow just sticks up on both of them. It is like moss gathering on the rails.

I have never seen it to affect the wires like this. I testified that when we got to Avon that we would have had time to have taken our engine and caboose and came into Helena, had it not been [33] for the fact that we were delayed by the train on this siding. I understood the conductor had directions to do that in the event that we didn't get in.

Q. Well, do you know how it was that this extra west sent a flagman down to stop you at Avon, instead of wiring?

A. I suppose he was having trouble with the wires.

Q. Is it the usual and customary method to stop a train at telegraph points?

A. Yes, it is, in emergency cases.

Q. Well, I mean if everything is working all right, if the wires are all right?

A. No, if the wires are all right they don't do that.

When No. 3 passed and this flagman ordered us to wait for this extra going west, it left us right there on the siding and we couldn't move. They notified us to stay there for that extra west. After that extra west had gotten there, we did not then have time to go into Helena with the engine and caboose. We had orders out of Garrison to flag on No. 4 out of Avon. There is a rule regarding our tying up

(Testimony of P. L. Gies.)

after sixteen hours, in the event that we get no instructions to tie up. There is a bulletin or rule whereby the crews will tie up of their own accord.

Recross-examination by Mr. BROWN.

Why, I knew of the storm and the snow when we were at Garrison but I didn't have any information about the wire failure or anything like that. I never saw the wires down on account of snow, except in this place here.

[Testimony of J. R. Shaw, for Defendant.]

J. R. SHAW, a witness called and sworn on behalf of the defendant, testified as follows:

Direct Examination by Mr. HALL.

My name is J. R. Shaw; I live at Missoula, Montana. I am [34] working for the Northern Pacific Railway Company, and was on May 1st and 2d, 1912, in the capacity of conductor. I took a train out of Missoula, May 1, 1912, extra 1654 east, a freight train. As to the weather conditions, at the time we left Missoula I don't recall any; no unusual conditions. I first remember of seeing snow on that trip at Drummond when we stopped there to water. I got out of the caboose. I remember the snow wetting through my shoes. It was a heavy wet snow. I couldn't say the amount. The snow had started to melt at Avon, when we got there. There was probably—oh, must have been ten inches of snow, wet and heavy. I have been railroading on the Rocky Mountain Division six years. The snowstorm is the only one I have ever seen that was heavy enough to

(Testimony of J. R. Shaw.)

take the wires down. That kind of a snowstorm on the movement of the trains, as compared with a dry snow, is harder on the rails; the train pulls a little heavier. The engine slips and all such things as that. As to the wires, the delay may come from the wires being down. When we left Garrison I had an understanding or instructions from the dispatcher there as to what we should do with this train in the event that it developed that we could not reach Helena within sixteen hours. Our understanding was that I would set my train out and we would go in with the caboose. There was no instruction as to any particular place that we should do that, but any place where I saw I couldn't make it with the train. We were to take the caboose and go into Helena in time for the sixteen hours. When we arrived at Avon at eleven o'clock, we still had plenty of time to take the engine and caboose and go into Helena. We didn't do that because we went to Avon for three and when three came there was an extra west that came on through on account of the wires being down. They put a flagman on No. 3 and held us at Avon until they arrived. We tied up about one fifteen and he came about the time we tied up. I remember seeing the conductor. It was not possible for us to go on east until we got that word. After this west bound train came along and we found we couldn't reach Helena with the engine and [35] caboose we tied up; it was too late to make it. We had standing instructions to tie up any time we couldn't get into Helena before the sixteen hours expired. We always had those instruc-

(Testimony of J. R. Shaw.)

tions, not to violate the sixteen hour law. When we tied up, the engine was taken around behind the caboose, taken around before we tied up, so as to be ready to go. Everybody left the engine, except the fireman and he watched the engine.

Q. Why was it that this west-bound train sent a flagman on No. 3 to notify you—wasn't Avon a telegraph station?

A. No wires; could get no communication with the dispatcher.

Cross-examination by Mr. BROWN.

I did not see any poles or wires down at Avon. I didn't see the condition of the wires between Helena and Avon. It was night-time when we left there. The dispatcher was located at Missoula. We arrived at Avon at eleven o'clock in the morning. I do not know anything about the communications between Avon and Helena, at that time; at the time we arrived there I did not see any poles or wires down at that time. I would have no reason to communicate with Helena. I do not know whether or not the wires were down between Avon and Helena. I made no attempt to communicate with Helena. I would have no reason to; the dispatcher is in Missoula.

Q. Could you have communicated with him around by the way of Butte to Missoula?

A. Well, I knew no way of doing that; I don't know whether you could get around that way or not. That is on a foreign road.

Q. The dispatcher was located at Missoula?

(Testimony of J. R. Shaw.)

A. He was. Helena is a terminal. They have engines and crews stationed there, if they are not on the road, or west of here. They are not supposed to have any after the last one goes out until some more gets in. I don't remember whether I received an order to tie up at Avon. I couldn't say whether I did or tied up myself. I would [36] have tied up myself if I hadn't got it. If I hadn't received it I would. It is customary to receive an order to tie up.

Redirect Examination by Mr. HALL.

The operation of these trains between Helena and Missoula would be conducted from Missoula, from the dispatcher's office. There would not be anybody in Helena that would know the location of the various trains on the division at that time. I could not reach Missoula.

The COURT.—You have standing instructions to govern your conduct when you are caught out on the road? A. We have to abide by the law.

Q. Do those instructions provide that some man shall take care of the engine?

A. No, the only instructions to the train crew is, to all of us, not to violate the sixteen hour law. We all have a copy of the sixteen hour law.

As to the care of the engine, under the sixteen hour law, it had been customary up to that time to have the fireman look after it. On account of the fact that he is concerned with the movements of the trains, after the train is tied up his business is watchman, to take care of the engine.

(Testimony of J. R. Shaw.)

Recross-examination by Mr. BROWN.

As to whether I could have communicated by way of Logan with Missoula, that is too much for me to answer. I don't know the condition of the wires. I am not an operator and I had no way of communicating on the wires at all, only through an operator. I didn't make any effort to do it.

Redirect Examination by Mr. HALL.

I do not know where Mr. Drew is. I understood he was away on a vacation but I am not sure. [37]

Recross-examination by Mr. BROWN.

After this extra train had passed us there at Avon we didn't come on into the terminal at Helena because I didn't have time. It was one fifteen or after when this train got there; this extra, and my sixteen hours was up at one forty-five. The reason I didn't come in was because I couldn't get in within the sixteen hours. I left Avon after my eight hours rest. I was there nine hours and some minutes. Then I came through with the train. The same train and engine and a different fireman.

[Testimony of H. L. Davis, for Defendant.]

H. L. DAVIS, a witness called on behalf of the defendant, being first duly sworn, testified as follows:

Direct Examination by Mr. HALL.

My name is H. L. Davis. I live at Missoula; am working for the Northern Pacific Railway as engineer. I was working for that company in that capacity on the second day of May, 1912. I run a train out of Missoula on the first day of May, 1912, extra

(Testimony of H. L. Davis.)

engine No. 1633, from Missoula to Helena. I left Missoula in the afternoon; As to the weather conditions at the time of leaving, I didn't notice anything. On that trip we encountered a snowstorm. I first observed snow about Bearmouth. I don't remember what time it was when we got to Bearmouth. It was at night sometime,—the evening. We got to Elliston in the morning about seven o'clock. The snow we found there was about half way up to your knees. The condition of the snow all along from Garrison up to Elliston was very heavy and wet. I have been working on the Rocky Mountain Division about fourteen years, about ten years an engineer. Prior to that I was fireman; traveling fireman. As to that snowstorm, I never saw anything as bad at that time of the year in my experience; that kind of a snow in May makes the track heavy and the poles and wires go down. It has [38] a great deal to do with the movement of trains. They had wire trouble. We couldn't get in communication with Missoula, as a result of that snow. When we got to Elliston about seven o'clock in the morning of the second, we were tied up there on account of the sixteen hour law. We had been on duty at seven o'clock that morning over fifteen hours; fifteen hours and twenty minutes, I think, when we were tied up. When we went in there I didn't have any tie up instructions. We stopped there because our sixteen hours were up. We headed in there because our sixteen hours were up. Went into the siding of my own accord. Upon tying up we all went to bed, except the fireman. He

(Testimony of H. L. Davis.)

watched the engine. There was nobody available and competent to watch the engine except him. The duty of a person who is watching the engine during the time the train is tied up, is to keep enough water in the boiler and enough fuel in to keep up steam to pump the water from the tank into the boiler. If an engine was allowed to die, or if the fire was allowed to go out entirely after the eight hours rest was up you couldn't move the engine until you got water into the boiler and fire enough to make steam. If the water in the meantime, by reason of leaking out of the boiler, or any other reason, had gotten below the level of the crown sheet, the top of the fire-box, you could not fire up the engine and pump water into the boiler. If that condition arose, that engine before you could put it into use, would have to be brought into some terminal point where we could get fuel and water. In the event the engine was dead you would have to take down the engine, disconnect the drive wheels from the piston rod, as there in no way of lubricating the valves and cylinders, which are lubricated from a lubricator or a cup that works by steam. So that if you had no steam you would have to disconnect the engine.

Q. How long would you say it would take for that to be done?

Mr. FREEMAN.—I don't see that this makes any difference at all. This is absolutely irrelevant and immaterial. [39]

The COURT.—Except to show hardship; it has no material bearing.

(Testimony of H. L. Davis.)

Mr. FREEMAN.—The law is plain upon that proposition.

The COURT.—Objection sustained.

Exception taken by the defendant.

This fireman was not required or supposed to move this locomotive or train during the time he was acting as watchman there. The crew took that train out after the period of rest was the same crew that I had in there, myself as engineer, and I had a fireman that relieved my fireman that I had; that is, the fireman who acted as watchman he did not act as fireman when we started out.

Cross-examination by Mr. BROWN.

It had always been the custom previous to this time for the fireman or the engineer to watch the engine when they were tied up. Sometimes we would have the fireman watch, and sometimes we would have the engineer watch her. I have watched her myself on some occasions. Elliston was a regular watering place. I did not attempt to communicate with Helena at all. I left that to the conductor; it was up to the conductor. The ordinary running time for trains of this kind from Missoula to Helena is twelve to fourteen hours. That is the average running time. We consumed in running from Missoula to Elliston about fifteen hours I think. The reason we went off duty at Elliston was because you couldn't make Helena within the sixteen hours. If it hadn't been for the storm I could have made Helena in sixteen hours. Eliminating the sixteen hour feature of

(Testimony of H. L. Davis.)

it, it was possible for us to proceed to Helena. The storm didn't prevent us from proceeding along provided the sixteen hour limit had not expired.

Redirect Examination by Mr. HALL.

That is, we could have got to Helena some time, if we had kept on,—in three or four days. Our instructions in regard to the [40] sixteen hour law, when we had been on duty sixteen hours, were to keep clear of the main track and tie up.

Recross-examination by Mr. BROWN.

Those instructions apply to the fireman as well as to the rest of the crew. They apply alike to all of the crew.

[Testimony of C. A. Bronson, for Defendant.]

C. A. BRONSON, a witness called on behalf of the defendant, being first duly sworn, testified as follows:

Direct Examination by Mr. HALL.

My name is C. A. Bronson. I live at Missoula, Montana; am working for the Northern Pacific Railway Company, and was working on the first and second days of May, 1912, for the Northern Pacific Railway Company, in the capacity of conductor. I had a train out of Missoula on the first of May, 1912, Extra 1633, running to Helena. We left Missoula in the evening, four or five o'clock, I think. As I remember it the weather was clear; I am not certain. I first remember seeing snow upon that trip between Bearmouth and Drummond. It was a wet, heavy snow. By the time we got to Elliston, there was

(Testimony of C. A. Bronson.)

ten inches, or something like that. I have been rail-roading on that division eight years. That was an unusual snowstorm for that time of the year. It would stick to the wires and make them heavy and break them down. In my experience I never knew of any other storm in that locality that had the same effect upon the wires. Because of the breaking down of the wires you could hardly get train orders for the movement of trains. It made the time slow coming over the road. We got to Elliston about seven o'clock A. M. We pulled into the side track and were tied up for orders. I think we had orders to tie up. We tied up at Elliston because we didn't have time to make Helena in our sixteen hours. The cause of this [41] failure to make the run within this sixteen hours to Helena was on account of the wires, the wire failure and the heavy snow.

[Testimony of B. Jensen, for Defendant.]

B. JENSEN, a witness called on behalf of the defendant, being first duly sworn, testified as follows:

Direct Examination by Mr. HALL.

My name is B. Jensen. I live at Missoula, Montana; am working for the Northern Pacific Railway Company, and was working in May, 1912, on an extra east as fireman. I had been working on the Rocky Mountain Division at that time about five years as fireman. When we left Missoula it was about the usual weather, I guess. We first ran into snow at Bearmouth. When we got to Elliston it was pretty deep, about ten inches I guess—along

(Testimony of B. Jensen.)

there. It had a bad effect upon the wires. After the train got to Elliston it was tied up there eight or nine hours. When the train tied up, I watched the engine for a period of about four hours, I think; something like that. From seven o'clock until they came to relieve me. A fireman came in on the first train to relieve me. I don't know which way he came, but he came on the first train. As soon as he came I was relieved.

Cross-examination by Mr. BROWN.

At that time it was customary for firemen to watch the engine after we were tied up as a result of being on sixteen hours.

Redirect Examination by Mr. HALL.

That is, that was the custom if no other men were available. [42]

[Testimony of H. E. Thompson, for Defendant.]

H. E. THOMPSON, a witness called on behalf of the defendant, being first duly sworn, testified as follows:

Direct Examination by Mr. HALL.

By name is H. E. Thompson. I live in Missoula. At present I am night chief dispatcher for the Northern Pacific Railway Company. May 2d, 1912, I was dispatcher at Garrison. I was acting as night chief. His duties were to relieve the day operator at eight o'clock in the evening, and assume the duties of the day chief, or any other official that may not be present, who has the disposition of all power at terminals, and direct the supervision of the move-

(Testimony of H. E. Thompson.)

ment of the trains on the division. A train running between Missoula and Helena at that time would always be handled from Missoula. That is the only point at which we have dispatchers located on the Rocky Mountain division. There was no dispatcher at Helena who had anything to do with the movement of the trains. The outlying points are controlled only by telegraph operators who take orders and deliver them to the parties to whom they are addressed. The main offices are located at division points. They operate the Montana division in a similar manner in which the chief operator at Missoula operates and controls the Rocky Mountain division. The chief operator at Livingston on the Montana division has no authority or control of a train west of Helena. He would be in no better position, no position to move the train than—well, he would be absolutely at sea, as though he did not control any wires at all, because he would consume at least, possibly five or six hours, in getting the location of the various trains on the Rocky Mountain division, in finding out where they all were. You see there might be extras going west and extras coming east. They wouldn't dare to give one man an order against another one, until he had found out where they all were.

That, of course, would take a great deal of time before he could get hold of the various operators along the line and find out the leaving [43] time and the location of each train. I have the train sheets with me covering the movements of the trains

(Testimony of H. E. Thompson.)

from Missoula east on May 1st and 2nd, 1912. I can tell from those train sheets, what the weather conditions were at the time No. 1633 left Missoula between four and five o'clock on May 1st. The dispatcher gets information from operators at various points along the line indicating the weather conditions at different times of the day, at four P. M. we will say and again at eight o'clock in the morning. The weather reports were en route between Missoula and Helena at four o'clock on the afternoon of May 1st. At four o'clock P. M. the weather indications were at Helena, cloudy, light northwest winds; at Blossburg the summit of the Continental divide, cloudy and light northwest wind. Elliston, cloudy, strong northwest wind, 38 above. At Garrison, strong northwest wind, cloudy, calm, 47 above; no rain. At Missoula was cloudy and light rain. The next is just a little notation made by the track dispatcher at five P. M. and he says, "Snowing at Blossburg, Drummond and Garrison to Avon. Snow two or three inches deep on the ground." No depth of snow mentioned from Blossburg to Drummond. At eleven forty P. M. fourteen inches of snow at Blossburg, sleet and rain. That is the only reference made to weather conditions on that day. At two o'clock the next morning the wires were all down east of Missoula. In Missoula the weather was cloudy, calm, and raining, with light snow. That was twelve, after midnight; east of Missoula the wires all went down at eleven forty and twelve o'clock at night. Communication was shut off from

(Testimony of H. E. Thompson.)

Missoula east. How far that condition extended east, I am unable to say. At the time 1633 was ordered out on the afternoon of the first there was not any weather condition at Missoula, or reports along the line, that would indicate difficulties in the moving of these trains. The weather report there shows that the temperature was some place between 42 and 60. Up to the time, and prior to the time, No. 1654 left there at about eleven o'clock, we had no report of [44] wire trouble. At the time that each of those trains were ordered out we were not able to foresee any unusual condition—no other than could be controlled by the reduction of tonnage, for instance. After the wires were down I made two attempts to communicate with these train crews from Missoula, and after waiting an hour or two hours after midnight, I am not entire positive, but when I saw the wires were down and that I couldn't get any communication east at all, I sent a message by way of Spokane, that is west, Spokane, Washington and routed via the Great Northern, by the way of Whitefish, Havre, Montana, and then Montana Central by way of Great Falls. It was received at the relay office here in Helena and transmitted to the dispatcher at Garrison.

Q. Do you recall what instructions you sent around in that roundabout way?

A. I remember making an attempt to get hold of the line to find out where the trains were and the various positions they occupied on the road east of Missoula and telling the time that the various crews

(Testimony of H. E. Thompson.)

that were moving the trains had been on and what time their sixteen hours expired. I am not positive whether I told him to relieve them or not. That would be understood, when he had information that the period expired, that would be sufficient. My idea was to advise him at the time each one of those crews had gone on duty at Missoula, and the time they should be released. Then a second attempt was also made, for the Great Northern might have been having similar trouble and I sent a message by way of Spokane and routed it by way of the Short Line coming up by way of Pocatello and by way of Butte. The wires were down between Butte and Garrison. I don't know whether it was received in Butte or not.

Q. What was the condition between Garrison and Elliston? [45]

A. Very similar to what they were west of Garrison, that is, relative to the wire condition west?

Q. Yes.

A. The same condition existed at Garrison when I got up there at nine thirty, which was the next morning. We had no wire communication to Helena.

Q. You came up to Garrison the next morning?

A. I came up to Garrison on Number 4 when we lost communications west. I got on No. 4 the next morning and moved east, with the intention of going until I did get in communication, and the period of time which elapsed between the time the wires went down and we established communication in a roundabout way was about six hours and thirty

(Testimony of H. E. Thompson.)

minutes, approximately.

There was a period of six hours and thirty minutes approximately that we had absolutely no communication whatever. I arrived at Garrison about two hours and fifty minutes after they had received my message, too late to act upon it. The information I had given them in my line-up was of no avail at the time it reached them. From condition of the wires east of Garrison it was impossible to control the movement of these two trains after they got out of Garrison. The same condition existed from Blossburg west; the wires were down at various points. On No. 4 going up I noticed the snow was wet and heavy and hanging, sticking, on to the wires, so that it would stick up six or eight, or possibly ten inches, and then every little while you would see a foot or two fall off. Take poles 180 feet apart, the snow wet and as heavy as it was, you could just get an idea of the weight that the wire was sustaining.

Poles and wires were down coming up from Garrison. Quite a number in about a half of mile, just guess at it. There wasn't a place for a quarter of a mile from Blossburg down that [46] the wires were not affected that way. That is, between Garrison and Drummond. Then east of Garrison, I have no personal knowledge of that, other than they had a gang working at it, a lot of section men and a gang of line men to repair. The cause of this train having to be tied up at Elliston was because the first train 1633 was there and unable to get in com-

(Testimony of H. E. Thompson.)

munication with the dispatcher to be instructed to reduce his train so that he could handle it sufficiently easy to get it into Helena. They did proceed afterwards from Drummond east, but they had to run to Garrison to get more coal and the snow was piled up on the rails to such an extent that it made it slippery and the engine would slip on account of the snow, the drivers would slip, and they used so much sand; they even had to run into Garrison for more coal and go back and get the train. All these delays occurred. Had they had communication and had known the actual conditions, the train would have been reduced so as to make it possible to have made Helena within the limit. I arrived at Garrison before No. 1654 pulled out of Garrison.

They were just getting ready to leave Garrison as I got off the train there, and either through myself, or the trainmaster,—I don't remember which one—instructed the crew we were talking to, but he asked me which way they would need the engine, whether we would need the engine and crew at Helena or at Missoula, and I told him at Helena, and I believe he told him. I am not positive, but I might have told them myself to go as far as they could, and then go back and take the engine and caboose and go to Helena. He still had time to go to Helena, set off the train at some siding and then take the engine and caboose and go to Helena, in the sixteen hours. They could best judge of the speed they could obtain and would know how long it would take

(Testimony of H. E. Thompson.)

them to get in. I have been working [47] on the Rocky Mountain division nine years, possibly ten. Seven years prior to that time I was employed as stenographer on the superintendent's car, the greater part of the time going over the road. Part of the time I was in the office in a clerical capacity. As to the character of the snowstorm in question as to being an ordinary or an extraordinary storm, I never had heard of anything just exactly like it before. When they told me the wires were broke down from the weight of the snow, I was skeptical, I had never seen anything like it and I had never heard anything like it. I remember my astonishment when I noticed the condition that did exist in the way of snow; the way it had piled up on the wires.

Before or since, I never had seen that. They have wet snow on the Coeur d'Alene and Lookout Mountain and in the Bitter Root range, but for a heavy, wet snow in the spring I don't think they have the wire troubles as bad as that was, because the wires there are those heavy wires, and they can sustain more weight. In other words they put up wires to meet that condition.

Cross-examination by Mr. BROWN.

The tonnage of train No. 1654 was 2,249 tons, and fifty-five loaded cars. The tonnage of No. 1633 was 55 loaded cars, 2244 tons. The tonnage rating of engine 1654 from Missoula to Garrison was 2,200 tons, and its rating from Garrison to Elliston was 1,600 tons. Engine 1633 in the same class. This

(Testimony of H. E. Thompson.)

train 1654 was loaded in excess of the maximum tonnage without taking into consideration the car limit, 60-car limit. It was a heavy moving train. It was up to the maximum.

As to who gave the orders for this extra west to proceed from Helena, I am under the impression that the orders were issued by the operator at Helena. The operator at Helena had no right to issue orders for that train. He took it upon [48] himself to act as dispatcher. These orders were supposed to be issued from Missoula.

Q. If that operator there could order trains out of Helena down to and past Avon, he could likewise have ordered another train out of there to relieve this crew, couldn't he?

A. No, because he wasn't in communication only as far as Blossburg. He called up Blossburg and gave him orders against all trains. He protected the track only as far as Blossburg.

The orders protected the movement of the extra only as far as Blossburg and when this extra got to Blossburg he would have been without any orders at all. He would have to have taken the siding and waited until he got orders to go out. The difficulty arose when he got to Austin. No. 3 passed him there and he put the block on No. 3 to guarantee his movement from Blossburg to Garrison, the double track.

Q. If this operator hadn't sent this extra 1633 out of Helena, train 1654 with the engine and caboose would have had time to reach Helena within the sixteen hours, would it not?

(Testimony of H. E. Thompson.)

Mr. HALL.—We object to this line of testimony as conjecture. There is no charge here of any negligence on the operator at Helena, or what might have happened if conditions had been different and all these conjectures are wholly incompetent, irrelevant and immaterial.

Mr. FREEMAN.—We admit as far as that is concerned at that time, the custom was if the train got tied up for any cause by reason of the sixteen-hour law, when the train had to be tied up and the crew relieved, it was the custom for the fireman to be left in charge of the train.

Mr. HALL.—Yes.

The COURT.—Well, suppose that is so, would that be at all material? [49]

Mr. FREEMAN.—The view we take of it is that it is not material at all, except that it goes to answer the defense which is already in, which has already been put in by witnesses for the defendant that the extra service of the fireman was required because of the storm.

The COURT.—Suppose they were compelled to tie up at Avon because of the storm, failing to get into Helena on time, and suppose this storm was of such severity that it would be classed as an act of God, they could have come on into Helena, even running over-time, and not be liable.

Mr. FREEMAN.—Yes, they could have continued right along, but they didn't.

The COURT.—But if they could have continued on, why should they stop; why couldn't they keep

(Testimony of H. E. Thompson.)

this fireman employed, necessarily because of the act of God, just the same as if they were running on the road?

It comes down to this: If they stopped there because of the storm and this train was suffered to come out of Helena, it wouldn't be very material anyhow.

Objection overruled.

Exception taken by the defendant.

Yes, they would have had ample time, with the engine and caboose, to have made Helena within the sixteen hour limit.

The COURT.—Do we understand that at points on the road all of the crew cut loose from the train and take the engine and caboose?

The WITNESS.—Yes, take the engine and caboose to Helena, where we would not have to protect the west bound train possibly, and getting them in where the engine would receive proper attention in the roundhouse, and not leave it to be tied up on the road without firing it, or without either water or fire, [50] because unless it is properly attended to it might cause damage and expense to the engine.

No. 1638 west left Helena after seven A. M. and passed Elliston at twelve. No. 4 arrived at Elliston at 10:32. That came from Missoula. It left Missoula at 7:57 A. M. A relief crew was not sent out on that train because we had no knowledge that 1633 was tied up. We had no way of knowing but what they had made Helena within the sixteen hour limit. No. 3 left Helena at 9:50 A. M. on the 2d. Arrived

(Testimony of H. E. Thompson.)

at Elliston at 11:09 A. M.

The crew of this train that was tied up could not have been relieved, there and a new engine have been sent out on this night train No. 6 at 8:40 P. M., because it would be dangerous to run a freight engine on a passenger train. I mean a double-header, of course. The freight engine of the type we were using at that time couldn't make the speed a passenger train would make.

A freight engine on a passenger train on a mountain grade, under its own steam, I believe is prohibited—it is prohibited by our rules, I won't say by law. It could have been coupled on.

No. 5 left Helena on May 2d at 8:55 P. M. Arrived at Avon at 10:40 P. M. In ten minutes the crew had been relieved.

Redirect Examination by Mr. HALL.

Relief came to the fireman at Elliston on the first train that passed there, after the tie-up. At the time train 1633 started out of Missoula on the afternoon of the first, the weather conditions as reported showed no unusual condition at all. There was no reason why that train shouldn't carry its full tonnage capacity. Conceding that there was snow and that I had heard there was snow upon the track up the road before I started out No. 1654, the effect of train No. 1633, a few hours ahead, would be to clear the rail of the—push the snow all off the rail and leave just a damp rail unless the weather was dry enough to absorb the dampness off the rail. In either event the rail would be clear, and it would be just the same as

(Testimony of H. E. Thompson.)

if there had been no snowstorm after the preceding train had passed over it.

At the time I started the second train, I hadn't heard of any wire trouble.

Q. Just explain, briefly, Mr. Thompson, how it is that passenger trains can move more rapidly when the wires are down than freight trains.

A. Well, the point is this: That passenger trains as [51] specified here have a given time and when he comes along he can go on that time and move right down the line, orders or no orders; and a freight train, extra, must have orders to move; it cannot leave terminals without orders of some kind.

When it leaves any place, he must first leave a terminal and he must have orders to leave a terminal, and when he gets into the next siding, he has gone the limit, and when he gets there he has to have another order.

Now, when you receive an order a train starts from Garrison with an order to meet a train at the first station east of Garrison, ten miles out.

Q. What would this extra have to do after it gets in there and makes that meet?

A. Had we had wires we would have reduced that train so that he could have moved. Another train was delayed from 11:00 A. M. until 1:15 P. M., on account of not having wires.

Mr. FREEMAN.—There is no evidence whatever here that these trains were delayed by any wire trouble. I object, in view of the fact that it has already been shown that the cause of this delay was

(Testimony of H. E. Thompson.)

the man down here sending out a train.

No ruling.

Q. As to the movement of an extra after it comes to a meeting point, anywhere between Missoula and Helena?

Mr. FREEMAN.—I object to that because there is no evidence that there is any meeting point of any of these trains at all.

The COURT.—Are any of these extras?

The WITNESS.—Both of them extras.

The COURT.—That is two freights?

The WITNESS.—Yes, two freights.

The COURT.—He may answer.

A. When it gets into the sidetrack to meet any train, it [52] cannot leave there until that train arrives, unless in an extreme emergency the conductor is permitted to take one of his brakeman off his train and put him on a train that is going past him. That brakeman will go on to a point designated by the conductor and get off there and follow the conductor's instructions as to holding opposing trains. For instance, this extra east has an order to meet at Avon, where No. 4 or any train that can pass him goes by, he can stop No. 4 and take his brakeman and send him to Elliston to hold another train. That is the only way he can move against that train without other orders, from Missoula.

The COURT.—I understand that this second train wasn't troubled by snow in its running.

A. Yes, the actual cause. The first train had encountered a great deal of snow and a great deal of

(Testimony of H. E. Thompson.)

delay by the engine slipping and running out of coal and going up against snow. Then the other man with the same number of cars, the same class of engine, with practically the same tonnage, with only a few tons difference, went over the track with practically no delay, went on to Garrison, where he was delayed on account of inability to get in communication with the dispatcher. The second delay almost of the same kind was caused at Avon on account of the inability to get orders to pass.

This second train was delayed at Garrison. The conductor reported that the time he was delayed at Garrison was three hours and fifteen minutes on account of wire failure. That was train No. 1654. That delay doesn't show on the train sheet because the dispatcher had no actual knowledge of the condition of the delayed train. That occurred while the wires were down and the dispatcher would have no opportunity to ascertain except by hearsay afterwards what the delay was.

Q. I will ask you to refer to Defendant's Exhibit 1 and [53] state if that is a bulletin issued by the company. A. Yes, sir.

Mr. HALL.—I now offer in evidence Exhibit 1, Defendant.

Which said exhibit was admitted without objection and is in the words and figures following, to wit:

[Defendant's Exhibit No. 1—Bulletin No. 103, Dated Missoula, March 28, 1912, Issued by Northern Pacific Railway Company.]

EXHIBIT 1—DEFENDANT.

“Missoula, March 28th, 1912.

Bulletin No. 103.

All Train and Engine men and others concerned.

The law requires that train and engine men must not be required nor permitted to remain on duty for a longer period than sixteen hours.

When a conductor or engineer is unable to communicate with the dispatcher on account of wire failure or other cause and has been on duty nearly sixteen hours, he must take the matter into his own hands and tie up at the first available point, in order to prevent a violation of the law. The dispatcher must be advised at the earliest opportunity.

A. M. BURT, Superintendent.

Recross-examination by Mr. BROWN.

This matter of superior trains is simply an arrangement of the railroad company for the movement of its trains. Rules and regulations made by the railroad company to expedite their movements.

[Testimony of R. F. Young, for Defendant.]

Whereupon R. F. YOUNG was called and sworn as a witness on behalf of the defendant and testified substantially as follows:

Direct Examination by Mr. HALL.

My name is R. F. Young. I live in Helena. I am in charge of the weather bureau. The local bureau

(Testimony of R. F. Young.)

of observation make [54] reports to me of their observation of the weather. We have substations in different parts of the state. We have substations in the vicinity of Elliston and Avon. As to snowfall as reported from those stations, May 1st and 2d, 1912—the station of Ophir ten or twelve miles north of Elliston, the first and second, the snowfall at that station was ten and a half inches. It began about midnight of the first. The name of the other station is Hatfield Creek south of Elliston, about five or six miles; I don't know the distance. The snowfall on the 2d of May was 13 inches. It started about four P. M. of the first. Hatfield is somewhat closer, to Avon,—I think two or three miles. These stations are in the neighborhood of 18 miles apart. Elliston is in between them. It is an unusual fall of snow for May.

Cross-examination by Mr. BROWN.

There is usually some snow in May, almost every year, at those stations. The average snowfall for May for Ophir is about 12 inches. This May there was ten and a half inches on those two days. The average snowfall at Hatfield creek for May is eleven inches; the total fall for the two days is 13 inches.

Redirect Examination by Mr. HALL.

When I speak of the average snowfall for May I mean for the entire month.

Defendant rests.

Mr. FREEMAN.—We have no rebuttal.

The foregoing is, in substance, all the evidence introduced at said trial. [55]

Mr. HALL.—Comes now the defendant and moves the Court at the close of all the evidence to direct a verdict in favor of the defendant, upon the following grounds, to wit:

1. The plaintiff's evidence is insufficient to sustain the charges as to the first cause of action, in that it fails to prove that Fireman Drew, after the sixteen hour period had expired, was engaged in and connected with the movement of said train.

2. That there is a fatal variance between the allegations of the complaint and the proof, in that the plaintiff has failed to prove that the defendant required and permitted its fireman, Drew, to be and remain on duty as such, for a longer period than sixteen consecutive hours.

3. That the evidence shows conclusively that the cause of the delay, making it necessary to have Drew act as watchman of said engine, after the sixteen hours had expired, was the result of an act of God.

4. That the evidence shows conclusively that the situation making it necessary to have Drew act as watchman of said engine, after sixteen hours had expired, was the result of a cause not known to the defendant, or its officers or agents in charge of said employee, at the time said employee left the terminal at Missoula, and it could not have been foreseen at that time.

These four grounds apply to the first cause of action, and we make the same motion as to the second cause of action upon exactly the same grounds, substituting the name of Jensen for that of fireman Drew.

Mr. FREEMAN.—On behalf of the Government, we move the Court to direct the jury to return a verdict for the plaintiff, for the reason the testimony of defendant fails to establish a legal [56] defense to the charges set forth in the complaint of the plaintiff, as to both causes of action.

The above motions of plaintiff and defendant were argued to the Court, and at the conclusion of such argument the Court denied the motion of the defendant and granted plaintiff's motion, and directed the jury to return a verdict in favor of the plaintiff on each cause of action.

To which ruling of the Court in granting the motion of plaintiff, and instructing the jury to return a verdict for the plaintiff, and in denying defendant's motion for a directed verdict, the defendant then and there duly excepted.

Thereupon the jury, pursuant to such direction of the Court, rendered its verdict in favor of the plaintiff, as follows:

"We, the jury in the above-entitled cause, find for the plaintiff and against the defendant on the two causes of action set forth in the complaint."

That thereafter, and on June 27, 1913, by consent of counsel for plaintiff, the Court granted defendant sixty days, in addition to the time allowed by law, to prepare and serve bill of exceptions in said cause.

That thereafter, and on the 27th day of June, 1913, the Court rendered and entered judgment in favor of the plaintiff and against the defendant in the sum of \$100.00 upon each of the two causes of action set forth in said complaint, together with plaintiff's

costs and disbursements, taxed in the sum of \$143.05.

Now comes the defendant, within proper time, and serves this, its proposed bill of exceptions.

GUNN, RASCH & HALL,
Attorneys for Defendant. [57]

Service admitted, and receipt of a copy of the foregoing proposed bill of exceptions acknowledged this 28 day of August, 1913.

J. W. FREEMAN,
WALTER N. BROWN,
Attorneys for Plaintiff.

[Stipulation Re Bill of Exceptions.]

It is hereby stipulated that the foregoing bill of exceptions is correct, and may be settled and allowed by the Court.

WALTER N. BROWN,
JAS. W. FREEMAN,
Attorneys for Plaintiff.
GUNN, RASCH & HALL,
Attorneys for Defendant.

[Order Settling and Allowing Bill of Exceptions.]

I, Geo. M. Bourquin, Judge of the United States District Court, for the District of Montana, do hereby certify that the foregoing bill of exceptions is true and correct, and is hereby settled and allowed by me.

Dated this 24th day of Sept., 1913.

GEO. M. BOURQUIN,
Judge.

Filed Sept. 24, 1913. Geo. W. Sproule, Clerk.

Thereafter, on November 1, 1913, defendant filed its assignment of errors herein in the words and figures following, to wit: [59]

*In the District Court of the United States, in and for
the District of Montana.*

No. 276.

THE UNITED STATES OF AMERICA,

Plaintiff,

vs.

NORTHERN PACIFIC RAILWAY COMPANY, a
Corporation,

Defendant.

Assignment of Errors.

Comes now the defendant, Northern Pacific Railway Company, plaintiff in error, and files the following assignment of errors, upon which it will rely upon its prosecution of the writ of error in the above-entitled cause:

1. That said Court erred in denying the motion of defendant and plaintiff in error for a directed verdict in favor of defendant on the first cause of action.

2. That said Court erred in denying the motion of defendant and plaintiff in error for a directed verdict in favor of the defendant on the second cause of action.

3. That said Court erred in granting the motion of plaintiff and defendant in error for a directed

verdict in favor of plaintiff on the first cause of action, and in instructing the jury to return such a verdict.

4. That said Court erred in granting the motion of plaintiff and defendant in error for a directed verdict in favor of plaintiff on the second cause of action, and in instructing the jury to return such a verdict.

5. That said Court erred in rendering judgment in said cause in favor of plaintiff and defendant in error, and that said judgment, [60] is contrary to the law and facts established in said cause.

WHEREFORE, the said defendant and plaintiff in error prays that the said judgment of the said District Court of the United States, in and for the District of Montana, be reversed and the case dismissed, or that the said District Court be directed to grant a new trial therein.

GUNN, RASCH & HALL,

Attorneys for Defendant and Plaintiff in Error.

Filed Nov. 1, 1913. Geo. W. Sproule, Clerk. [61]

Thereafter, on November 1, 1913, petition for writ of error and order allowing same were duly filed and entered herein, being in the words and figures following, to wit: [62]

*In the District Court of the United States, in and for
the District of Montana.*

No. 276.

THE UNITED STATES OF AMERICA,

Plaintiff,

vs.

NORTHERN PACIFIC RAILWAY COMPANY, a
Corporation,

Defendant.

**Petition for Writ of Error and Supersedeas of the
Defendant, Northern Pacific Railway Company.**

The Northern Pacific Railway Company, defendant in the above-entitled cause, feeling itself aggrieved by the decision of the Court and the judgment entered in said cause, on the 27th day of June, 1913, for the sum of One Hundred (\$100.00) Dollars, on each of the two causes of action set out in the complaint in said cause, and for the further sum of One Hundred Forty-three and 05/100 (\$143.05) Dollars costs, comes now, by Gunn, Rasch & Hall, its attorneys, and petitions the Court for an order allowing said defendant to prosecute a writ of error to the Honorable, the United States Circuit Court of Appeals, for the Ninth Circuit, under and according to the laws of the United States in that behalf made and provided, and also that an order be made fixing the amount of security which the said defendant shall give and furnish upon said writ of error, and that upon the giving of such security all further proceedings in this court be suspended and stayed

until the determination of said writ of error by the United States Circuit Court of Appeals, for the Ninth Circuit.

And your petitioner will ever pray.

GUNN, RASCH & HALL,
Attorneys for Defendant. [63]

Order Allowing Writ of Error and Fixing Amount of Bond.

Upon motion of Gunn, Rasch & Hall, attorneys for the defendant Northern Pacific Railway Company, the foregoing petition for a writ of error is hereby granted, and it is ordered that a writ of error be, and hereby is, allowed to have reviewed in the United States Circuit Court of Appeals, for the Ninth Circuit, the judgment heretofore entered herein, on the 27th day of June, 1913, and that the amount of bond on said writ of error be, and hereby is, fixed at the sum of three hundred dollars.

GEO. M. BOURQUIN,
Judge.

Filed and Entered Nov. 1, 1913. Geo. W. Sproule,
Clerk. [64]

Thereafter, on November 5, 1913, bond on writ of error was duly filed herein, being in the words and figures following, to wit: [65]

*In the District Court of the United States, in and for
the District of Montana.*

No. 276.

THE UNITED STATES OF AMERICA,

Plaintiff,

vs.

NORTHERN PACIFIC RAILWAY COMPANY, a
Corporation,

Defendant.

Bond on Writ of Error.

KNOW ALL MEN BY THESE PRESENTS:

That we, Northern Pacific Railway Company, as principal, and the National Surety Company, a corporation, organized and existing under the laws of the State of New York, and duly authorized to do business as a surety company in the State of Montana, as surety, are held and firmly bound unto the United States of America, in the full and just sum of Three Hundred (\$300.00) dollars, to be paid to the United States of America, for which payment well and truly to be made we bind ourselves, our successors and assigns jointly and severally firmly by these presents.

Sealed with our seals and dated this 3d day of November, 1913.

WHEREAS, lately, at a session of the District Court of the United States, in and for the District of Montana, in a suit pending in said court between the United States of America, plaintiff, and North-

ern Pacific Railway Company, defendant, a final judgment was rendered against said defendant, and the said Northern Pacific Railway Company, defendant, having obtained from said Court a writ of error to reverse the judgment in the aforesaid suit, and a citation directed to said United States of America, plaintiff, is about to be issued, citing and admonishing said plaintiff to be [66] and appear at the United States Circuit Court of Appeals, for the Ninth Circuit, to be holden at San Francisco, California:

NOW, THEREFORE, the condition of the above obligation is such that if the said Northern Pacific Railway Company shall prosecute its writ of error to effect, and shall answer all damages and costs that may be awarded against it if it fails to make its plea good, then the above obligation to be void; otherwise to remain in full force and virtue.

Dated this 3 day of November, 1913.

NORTHERN PACIFIC RAILWAY COMPANY,

By GUNN & RASCH,
Division Counsel.

[Corporate Seal]

NATIONAL SURETY COMPANY,

By W. K. ARMSTRONG,
Its Attorney in Fact, Hereunto Duly Authorized,
Surety.

The foregoing bond is hereby approved.

BOURQUIN,
Judge.

Filed Nov. 5, 1913. Geo. W. Sproule, Clerk. [67]

Thereafter, on November 5th, 1913, writ of error was duly issued herein, which said writ of error is hereto annexed and is in the words and figures following, to wit: [68]

*In the District Court of the United States, in and for
the District of Montana.*

No. 276.

THE UNITED STATES OF AMERICA,

Plaintiff,

vs.

NORTHERN PACIFIC RAILWAY COMPANY, a
Corporation,

Defendant.

Writ of Error.

United States of America,—ss.

The President of the United States to the Honorable, the Judge of the District Court of the United States, for the District of Montana, Greeting:

Because in the records and proceedings, as also in the rendition of the judgment of a plea, which is in said District Court before you, between the Northern Pacific Railway Company, plaintiff in error, and the United States of America, defendant in error, a manifest error hath happened, to the great damage of the said Northern Pacific Railway Company, the plaintiff in error, as by its petition herein appears:

We, being willing that error, if any hath happened, should be duly corrected and full, and speedy

justice done to the parties aforesaid, in this behalf do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals, for the Ninth Circuit, together with this Writ, so that you have the same at the city of San Francisco, in the State of California, on the 5th day of December, 1913, next, in the said Circuit Court [69] of Appeals, to be then and there held, that the record and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that which what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable EDWARD DOUGLAS WHITE, Chief Justice of the Supreme Court of the United States, this 5 day of November, in the year of our Lord one thousand nine hundred and thirteen.

[Seal]

GEO. W. SPROULE,

Clerk of the District Court of the United States, in
and for the District of Montana.

Allowed by:

GEO. M. BOURQUIN,

District Judge.

Service of the within Writ of Error, and receipt of a copy thereof, is hereby acknowledged this 5th day of November, 1913.

W. N. BROWN,

B. K. WHEELER,

Attorneys for Defendant in Error. [70]

Answer of Court to Writ of Error.

The Answer of the Honorable, the Judge of the District Court of the United States for the District of Montana, to the foregoing writ:

The record and proceedings whereof mention is within made, with all things touching the same, I certify, under the seal of said District Court, to the United States Circuit Court of Appeals for the Ninth Circuit, within mentioned, at the day and place within contained, in a certain schedule to this writ annexed, as within I am commanded.

By the Court,

[Seal]

GEO. W. SPROULE,

Clerk.

By C. R. Garlow,

Deputy Clerk. [71]

[Endorsed]: No. 276. District Court of the United States, District of Montana. United States of America, Plaintiff, vs. Northern Pacific Railway Company, a Corporation, Defendant. Writ of Error. Filed Nov. 5, 1913. Geo. W. Sproule, Clerk.

[72]

Thereafter, on November 5, 1913, a Citation was duly issued herein, which said Citation is hereto annexed and is in the words and figures following, to wit: [73]

Citation [on Writ of Error].

UNITED STATES OF AMERICA,—ss.

The President of the United States to the United States of America and B. K. Wheeler, the United States District Attorney for Montana, and Walter N. Brown, Special Assistant to the Attorney General of the United States:

You are hereby cited and admonished to be and appear at the United States Circuit Court of Appeals, for the Ninth Circuit, to be held at the city of San Francisco, in the State of California, within thirty days from the date of this writ, pursuant to a writ of error on file in the clerk's office of the District Court of the United States, in and for the District of Montana, wherein the Northern Pacific Railway Company is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment in said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the Honorable EDWARD DOUGLAS WHITE, Chief Justice of the Supreme Court of the United States of America, this 5 day of November, 1913, and of the Independence of the United States the one hundred and thirty-eighth.

GEO. M. BOURQUIN,

United States District Judge.

Service of the foregoing citation received and

copy thereof admitted, this 5th day of November, 1913.

W. N. BROWN,
B. K. WHEELER,

Attorneys for Defendant in Error. [74]

[Endorsed]: No. 276. United States District Court, District of Montana. The United States of America, Defendant in Error, vs. Northern Pacific Railway Company, a Corporation, Plaintiff in Error. Citation. Filed Nov. 5, 1913. Geo. W. Sproule, Clerk. [75]

[Certificate of Clerk U. S. District Court to Record.]

United States of America,
District of Montana,—ss.

I, Geo. W. Sproule, Clerk of the United States District Court for the District of Montana, do hereby certify and return to the Honorable, the United States Circuit Court of Appeals for the Ninth Circuit, that the foregoing volume, consisting of 76 pages, numbered consecutively from 1 to 76, inclusive, is a true and correct transcript of the pleadings, process, orders, verdict and judgment, and all proceedings had in said cause, and of the whole thereof, as appears from the original records and files of said court in my possession as such Clerk; and I further certify and return that I have annexed to said transcript and included in said paging the original writ of error and citation issued in said cause.

I further certify that the costs of the transcript

of record amount to the sum of Twelve and 25/100 Dollars (\$12.25), and have been paid by the plaintiff in error.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said Court at Helena, Montana, this 18th day of November, A. D. 1913.

[Seal]

GEO. W. SPROULE,
Clerk.

By C. R. Garlow,
Deputy Clerk. [76]

[Endorsed]: No. 2343. United States Circuit Court of Appeals for the Ninth Circuit. Northern Pacific Railway Company, a Corporation, Plaintiff in Error, vs. United States of America, Defendant in Error. Transcript of Record. Upon Writ of Error to the United States District Court of the District of Montana.

Received and filed November 21, 1913.

FRANK D. MONCKTON,
Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

By Meredith Sawyer,
Deputy Clerk.

United States
Circuit Court of Appeals
For the Ninth Circuit.

NORTHERN PACIFIC RAILWAY COMPANY,
a corporation,

Plaintiff in Error,

vs.

UNITED STATES OF AMERICA,

Defendant in Error.

Brief of Plaintiff in Error.

STATEMENT OF FACTS.

The defendant in error, hereinafter for convenience called the plaintiff, filed a complaint against the plaintiff in error, hereinafter for convenience called the defendant, containing two causes of action, each charging the defendant with a vio-

lation of the Federal Sixteen-hour Law (Tr. pp. 2 to 5.)

The first cause of action relates to a fireman by the name of Drew, employed on an extra interstate freight train, No. 1654, going east from the terminal at Missoula, Montana, to the terminal at Helena, Montana, a distance of 120 miles. Drew was called and reported for duty at ten p. m. on May 1, 1912, and the train departed from Missoula at eleven p. m. It arrived at Avon, eighty-two miles east of Missoula, at eleven a. m. May 2 and was held there with the train crew, including Fireman Drew, until one fifteen p. m. of said day (Tr. p. 21.) Then, pursuant to a standing order, bulletin No. 103 (Tr. p. 58) the crew, including Drew, having been on duty fifteen hours and fifteen minutes, and not having time to make the remaining thirty-eight miles to the terminal at Helena, were laid off and "relieved from all work in connection with the actual physical movement of said train" (Tr. pp. 22 and 37.)

Fireman Drew was then required and permitted to remain on said engine, standing on a side track, in the capacity of watchman for several hours until a suitable man could be procured to relieve him. It was his duty to keep a small fire in the engine so as to generate sufficient steam to pump water into the boiler to prevent the water from getting below the level of the crown sheet, and to pump water when necessary for such purpose to prevent the

engine from becoming dead (Tr. p. 22.)

If an engine is allowed to die, or the fire is allowed to go out entirely, the engine cannot be moved until there is water in the boiler and fire enough to make steam. In the meantime, if the water in the boiler, by reason of leaking out, or for any other reason, gets below the level of the crown sheet, it is impossible to fire up the engine so as to pump water into the boiler. The boiler cannot be filled in any other way, and the engine becomes dead and has to be disconnected and hauled to a terminal for the boiler to be filled (Tr. pp. 26 and 39.)

Upon these facts, which stand admitted or are undisputed, the defendant denied any violation of the Federal Sixteen-hour Law in permitting Drew to act as watchman of said engine.

The second cause of action relates to a fireman by the name of Jenson, employed on an extra interstate freight train, No. 1633, also going east from the terminal at Missoula to the terminal at Helena. Jenson was called and reported for duty at three-forty p. m. of May 1, 1912, and the train departed from Missoula at four twenty-five p. m. It arrived at Elliston, ninety-one miles east of Missoula, at seven a. m. May 2nd. Then, pursuant to said bulletin No. 103 (Tr. p. 58) the crew, including Jenson, having been on duty fifteen hours and twenty minutes, and not having time to make the remaining twenty-nine miles to the terminal at Helena, were

laid off and “relieved from all work in connection with the actual physical movement of said train.” (Tr. pp. 23 and 38.)

Fireman Jenson was required and permitted to remain on said engine, standing on the side track, in the capacity of watchman for several hours until a suitable man could be procured to relieve him (Tr. pp. 24 and 43.) His duties as watchman and the necessity for a watchman being the same as stated above in connection with the first cause of action.

Upon these facts, which stand admitted or are undisputed, the defendant denied any violation of the Federal Sixteen-hour Law in permitting Jenson to act as watchman of said engine.

To each of said causes of action the defendant in its answer also pleaded a further and separate defense (Tr. pp. 10 and 12), alleging that after the trains left Missoula, they encountered storms and snow fall of such unusual and unprecedented violence and severity that telegraph and telephone lines were broken and torn down, completely destroying and cutting off all means of communication with the dispatchers and operators, making it impossible to proceed with said trains; that the delay in the movement of said trains, and the necessity of watching said engines by the firemen, were occasioned by, and due to, the Act of God, and the result of causes which were not known to the defendant, or its officers, at the time the trains left the

terminal and could not have been foreseen.

In support of these further defenses defendant introduced evidence showing: That at the time the trains departed from Missoula, no reports had been received of any unusual snow storm, nor any report of wire trouble (Tr. pp. 45 and 46); that at five p. m. May 1st, two or three inches of snow was reported at Blossberg, Drummond and Garrison to Avon, and no further report of snow was received at Missoula until eleven forty p. m., which was forty minutes after extra No. 1654 had departed, when it was reported that snow fourteen inches in depth had fallen at Blossberg (Tr. p. 45.)

Starting from Missoula, the stations above referred to are passed in the following order: Bearmouth, Drummond, Garrison, Avon, Elliston (Tr. p. 25) and Blossberg, the last mentioned point being on the Rocky Mountain divide which extends between Elliston and Helena (Tr. p. 51.)

At the time the report was received at eleven forty p. m., stating that there was fourteen inches of snow at Blossberg, there was nothing to indicate the peculiar character of such snow, and no information of broken wires was received until two p. m. of May 2nd (Tr. p. 45). The snow was a wet and heavy snow, stuck to and piled up on the wires from six to eight inches high (Tr. p. 48), and by the morning of May 2nd was from ten to fourteen inches deep all the way from Drummond to Bloss-

berg. Its weight on the wires had broken them, and had thrown over telegraph and telephone poles at various places along the line of the railroad (Tr. pp. 25, 33, 38, 41 and 48.) Five railroad men, who had been working upon the Rocky Mountain Division between Missoula and Helena from five to fourteen years, testified that the storm was an extraordinary one; that they had never before seen one like it, and had never before seen a storm that broke the wires and poles down (Tr. pp. 25, 33, 38, 41 and 48.)

R. F. Young, in charge of the weather bureau, corroborated these witnesses to the effect that it was an unusual fall of snow (Tr. p. 59.)

The cause of the delays is explained by the witnesses as follows:

“The delay came from the wires being down.” (Tr. p. 34.) “That kind of snow in May makes the track heavy and the poles and wires go down. It has a great deal to do with movement of trains. They had wire trouble. We couldn’t get any connection with Missoula, as a result of that snow” (Tr. p. 38.) “Because of the breaking down of wires you could hardly get train orders for the movement of trains. It made the time slow in coming over the road. * * * The cause of this failure to make the run within this sixteen hours to Helena was on account of the wires, the wire

failure and the heavy snow” (Tr. p. 42.) “A train running between Missoula and Helena at that time would always be handled from Missoula” (Tr. p. 44.) “There was a period of six hours and thirty minutes approximately that we had absolutely no communication whatever.

* * * From conditions of the wires east of Garrison it was impossible to control the movement of these two trains after they got out of Garrison. The same condition existed from Blossburg west; wires were down at various points” (Tr. p. 48.) “Every train, extra, must have orders to move. * * * When it leaves any place, he must first leave a terminal and he must have orders to leave a terminal, and when he gets into the next siding he has gone the limit, and when he gets there he has to have another order” (Tr. p. 55.) “When it gets into the side track to meet any train it cannot leave there until that train arrives unless in an extreme emergency the conductor is permitted to take one of his brakemen off his train and put him on the train that is going past him. That brakeman will go on to a point designated by the conductor and get off there and follow the conductor’s instructions as to holding opposing trains” (Tr. p. 56.) “The actual cause. The first train had encountered a great deal of snow and a great deal of delay by the engine

slipping and running out of coal and going up against snow. Then the other man with the same number of cars, the same class of engine, with practically the same tonnage, with only a few tons difference, went over the track with practically no delay, went on to Garrison, where he was delayed on account of inability to get in communication with the dispatcher. The second delay almost of the same kind was caused at Avon on account of the inability to get orders to pass.”

This second train was delayed at Garrison. The conductor reported that the time he was delayed at Garrison was three hours and fifteen minutes on account of wire failure. That was train No. 1654.” (Tr. pp. 56 and 57.)

No evidence was offered to contradict this testimony of defendant’s witnesses, (Tr. p. 69). At the close of the evidence the defendant moved the court for a directed verdict in its favor on each cause of action, (Tr. p. 60), which the court denied, but granted plaintiff’s motion, and instructed the jury to return a verdict for the plaintiff on each cause of action, (Tr. p. 61).

ASSIGNMENT OF ERRORS.

1. The court erred in denying the motion of defendant for a directed verdict in its favor on the first cause of action.

2. The court erred in denying the motion of defendant for a directed verdict in its favor on the second cause of action.

3. The court erred in granting the motion of plaintiff for a directed verdict in favor of plaintiff on the first cause of action, and in instructing the jury to return such a verdict.

4. The court erred in granting the motion of plaintiff for a directed verdict in favor of plaintiff on the second cause of action, and in instructing the jury to return such verdict.

5. The court erred in rendering judgment in favor of the plaintiff and against the defendant. (Tr. pp. 63 and 64.)

ARGUMENT.

There are three questions presented by the assignment of errors in this case:

1. Were fireman Drew and Jenson, after the further movement of the train had been abandoned by the crews, and while they were acting as watchmen of their engines until other men could be procured from the nearest available point, still on duty

as firemen within the meaning of the federal 16-hour law—that is, were they still “*actually engaged* in, or connected with, the *movement* of” trains.

2. Was the delay or tie-up of the trains, under the circumstances disclosed by the record, which necessitated the employment of the firemen as watchmen of their engines, caused by an act of God, relieving the defendant from responsibility.

3. If the tie-up was not caused by an act of God, was it the result of a cause not known to the carrier or its officer or agent in charge of such employees at the time said employees left the terminal, and which could not have been foreseen, in which case there would likewise be no liability.

I.

On the first question we find no authority directly in point. The courts have construed the law in a number of cases, and have held that “trivial interruptions” do not relieve an employe from duty so as to break a consecutive service of sixteen hours. The term “trivial interruptions” appears to have been adopted by the courts as a term to define the usual delays or stops occasioned by meeting of trains, eating of meals, the period intervening after a crew has been called for duty and the time their train actually leaves the terminal, etc.

During such periods of “trivial interruptions” the train crew is held to be on duty and “actually

engaged in or connected with the movement of" a train.

United States v. C. M. & P. S. Ry. Co., 197
Fed. 624;

United States v. Denver & R. G. Ry Co.,
197 Fed. 629;

United States v. Atchison T. & S. F. Ry.
Co., 220 U. S. 37—55 L. Ed. 361.

It is apparent, however, that the principle of these cases is not applicable to the facts of the case at bar. Here the crews had been on duty almost sixteen hours. The train was side-tracked and the crew relieved for the express purpose of complying with the 16-hour law. Their duties connected with the *movement* of the trains had terminated as fully as if they had reached the terminal or point of destination. This was not a "trivial interruption." The abandonment of the train made it necessary to leave someone in charge of the engine, but no one was available for the time being except the fireman.

WATCHMAN NOT ACTUALLY ENGAGED IN THE MOVEMENT OF THE TRAIN.

Were said firemen during the time they were employed *as watchmen* of said engines "*actually engaged in or connected with the movement of any train,*" within the meaning of the Act of March 4,

1907, entitled “An act to promote the safety of employees and travelers upon railroads by limiting the hours of service of employes therein”? (1909 Supplement to U. S. Annotated Statutes, p. 581—U. S. Compiled tSatutes Supplement, 1909, p. 1170.)

The title of this act declares that it is an act “to *promote the safety of employees and travelers*,” and the last sentence of section 1 of said act clearly defines the class of “employes” of railroads to whom the provisions of the act shall apply. It reads as follows:

“And the term ‘employees’ as used in this act shall be held to mean persons *actually engaged in or connected with the movement of any train*.” (Italics ours.)

Therefore the word “employee” as used in section 2 of said act is limited to those defined in section 1 thereof.

Section 2 of said act reads as follows:

“That it shall be unlawful for any common carrier, its officers or agents, subject to this Act to require or permit any employee *subject to this Act* to be or remain on duty for a longer period than sixteen consecutive hours, and whenever any such employee of such common carrier shall have been continuously on duty for sixteen hours he shall be relieved and not required or permitted again to go on duty until he has had at least ten consecutive hours off

duty; and no such employee who has been on duty sixteen hours in the aggregate in any twenty-four-hour period shall be required or permitted to continue or again go on duty without having had at least eight consecutive hours off duty: Provided, that no *operator, train dispatcher, or other employee who by the use of the telegraph or telephone dispatches, reports, transmits, receives or delivers orders pertaining to or affecting train movements* shall be required or permitted to be or remain on duty for a longer period than nine hours in any twenty-four-hour period in all towers, offices, places, and stations continuously operated night and day, nor for a longer period than thirteen hours in all towers, offices, places, and stations operated only during the daytime, except in case of emergency, when the employees named in this proviso may be permitted to be and remain on duty for four additional hours in a twenty-four-hour period on not exceeding three days in any week:" (Italics are ours.)

The tenor and context of the act, including the title thereof, shows that congress intended thereby more fully to protect travelers and employees on *moving trains* from the many accidents, wrecks and dangers known to result from neglect and mistakes of employees *actually* engaged in, or connected with, the *movement* of such trains and caused by over-

work or too many hours on duty under the severe strain necessarily incident to the movement of trains.

It was the *safety* of such persons, rather than *limiting* the hours of labor of railroad employees generally, that the act is intended to “promote.” That is, the law is intended to promote the *safety* of all persons on trains, whether “travelers” or “employees,” by limiting the hours of duty of the employees *actually* engaged in, or *actually* connected with, the movement of trains.

The act is in the nature of the “safety appliance law” intended for the *protection* of the traveling public, including such employees as necessarily travel on trains in performance of their duties and not in the nature of a labor law, such as “eight-hour laws,” intended primarily to benefit the individual performing the labor.

Limiting the hours of service of operators, train dispatchers, engineers, conductors and other employees covered by the act, was done for the purpose of promoting the safety of those persons whose lives may be endangered by a too long continuous service of the employees actually engaged in, or connected with, the movement of trains.

It is worthy of note that the title of this act employs the same language as appears in the title of the “safety appliance” act of March 2, 1893, which reads as follows:

“An act to promote the safety of employes and travelers upon railroads by compelling common carriers engaged in interstate commerce to equip their cars with automatic couplers,” etc.

Not only does the title of the act indicate that such was the sole purpose of the act (and the title of an act may be referred to where the meaning of the body of the act is doubtful, *Church of Holy Trinity v. U. S.*, 143 U. S. 457—36 L. Ed. 226—36 Cyc. 1133), but the language of the last sentence of section 1, which expressly defines what employees it covers, shows the same purpose.

Furthermore, the language of section 2 makes the same limitation by naming the class of employees “*connected* with the movement of any train,” namely, “operators, train dispatchers or other employe who, by use of the telegraph or telephone dispatches, reports, transmits, receives or delivers orders pertaining to or affecting *train movements*,” who shall not be required or permitted to remain on duty in excess of a certain period.

The persons “actually *engaged* in * * * the movement of any train,” within the meaning of section 1, are the train crew while the train is moving, which includes the period of “trivial interruptions” pointed out in the cases cited above; while the persons “actually *connected* with the movement of any train” are the classes of persons enum-

erated in section 2, such as operators, etc. The enumerations of these employes in section 2, shows what class of employees are covered by the words "connected with," as used in the last sentence of section 1, and materially assists in determining why such words, as well as the words "engaged in," were there employed.

Manifestly the law does not apply to section men, bridge gangs, civil engineers, hostlers in a roundhouse, nor to a watchman of an engine which has been set out on a side track to remain standing for a definite period of eight or ten hours.

The hours of service of a watchman has no more connection with the *safety* of travelers or employees on a *moving train*, than do the hours of service of a section man, bridge man, civil engineer or hostler, and none of such employees are "actually engaged in, or connected with, the movement of any train," and do not come within the provisions of said law.

The act of congress was carefully analyzed and construed in the case of *Baltimore & O. R. Co. v. Interstate Commerce Commission*, 221 U. S. 612—55 L. Ed. 878.

In that case the court said:

"No difficulty arises in the construction of this language. The first sentence states the application to carriers and employees who are 'engaged in the transportation of passengers or

property by railroad' in the District of Columbia or the territories, or in interstate or foreign commerce. The definition in the second sentence, of what the terms 'railroad' and 'employees' shall include, qualify these words as previously used, but do not remove the limitation as to the nature of the transportation in which the employees must be engaged in order to come within the provisions of the statute. If the definition in the last part of the sentence, of the words used in the first part, be read in connection with the latter, the meaning of the whole becomes obvious. The section, in effect, thus provides: 'This act shall apply to any common carrier or carriers, their officers, agents, and employees (meaning by 'employees' persons *actually engaged* in or *connected* with the *movement* of any train.), engaged in the transportation of passengers or property by railroad (meaning by 'railroad' to include all bridges and ferries used or operated in connection with any railroad) in the District of Columbia or any territory * * * or from one state * * * to any other state,' etc. * * *

"In the present statute, the limiting words govern the employees as well as the carriers.
* * *

"The fundamental question here is whether a restriction upon the hours of labor of em-

ployees who are connected with the *movement of trains* in interstate transportation is comprehended within this sphere of authorized legislation. This question admits of but one answer. The length of hours or service has direct relation to the efficiency of the human agencies upon which *protection to life and property necessarily depends*. This has been repeatedly emphasized in official reports of the Interstate Commerce Commission, and is a matter so plain as to require no elaboration. In its power suitable to provide for the *safety of employees and travelers*, Congress was not limited to the enactment of laws relating to mechanical appliances, but it was also competent to consider, and to endeavor to reduce, the dangers incident to the *strain of excessive* hours of duty on the part of *engineers, conductors, train dispatchers, telegraphers, and other persons embraced within the class defined by the act*. And in imposing restrictions having *reasonable relation* to this end there is no interference with liberty of contract as guaranteed by the Constitution.” (Italics are ours.)

As thus construed by the court of last resort, it is clear that the act is one enacted for the protection of life and property, and applicable only to “engineers, conductors, train dispatchers, telegraphers,” and other employees, required to perform like

or similar duties, as is contended for by defendant in this case.

In the case of *United States v. Kansas City So. Ry. Co.*, 189 Fed. 471, the court, in discussing the purposes of the act, said:

“The act being remedial, for the purpose of *preventing accidents to trains and consequent injuries to passengers and employes*, it is the duty of the courts to construe it liberally in order to accomplish the purpose of its enactment. *Johnson v. Southern Pacific R. R. Co.*, 196 U. S. 1, 25 Sup. Ct. 158, 49 L. Ed. 363.” (Italics ours.)

Were it not for the word “actually” as used in the last sentence of section 1 of the act, it might be urged that sectionmen, bridge men, hostlers, or watchmen of an engine, were engaged in, or connected with, the movement of trains. *Constructively* they would be, as the proper condition of the roadbed, bridges, care of the engine in the roundhouse, or on a side track, is “*virtually*” or “*constructively*” connected with the movement of trains.

But the word “*actually*” must have been inserted for a purpose. It cannot be ignored. It is a word often used in legal phraseology and means the opposite of “*constructive*” or “*virtual*.”

In *Cutting v. Patterson*, 85 N. W. (Minn.) 172, the court said:

“The word ‘actual’ is usually used in a

statute in opposition to 'virtual' or 'constructive', and calls for an open, visible occupancy. Black, Law Dict. pp. 230, 290. The same definitions are found in 2 Bouv. Law Dict. pp. 254, 349."

Anderson's Law Dictionary defines "actual" as follows:

"Existing in act; really acted; real at present time; as a matter of fact.

"Opposed, constructive, speculative, implied, legal."

See also:

1 Words & Phrases, pp. 151 et seq.

1 Cyc. 761, note 34.

In *Bunting v. Saltz*, 24 Pac. (Cal.), 167, the court defined "actual" as follows:

" 'Actual' means existing in act, and truly and absolutely so; really acted or acting; carried out; opposed to potential, possible, virtual or theoretical."

In *McIntyre v. Sherwood*, 22 Pac. (Cal.) 937, the court said:

"This word 'actual' is not unusual in legal phraseology, and is used as the opposite of 'constructive.' Thus we speak of actual possession, actual notice, actual fraud. But, whatever may be the strict and literal signification of the word, it is not to be unnecessarily assumed that in such documents as constitutions

and Codes, or even decisions, words are used without meaning. Therefore, it is fair to presume that the law-givers meant something by the use of the word 'actual:' that they supposed it added something to the meaning of the word 'settlers.' ”

So in the construction of this act, it is fair to presume that Congress intended that the word “actually” as used in the last sentence of section 1 should mean something and be given some effect, and the meaning of the word having been judicially fixed and defined, it must be presumed that it was used in that sense and was intended to be given effect according to its meaning as defined by the courts.

We submit that there was a break in the sixteen-hour consecutive period of service contemplated by the statute, when the train and engine were sidetracked; that when the firemen took charge of the engines, *as watchmen*, they were no longer *actually engaged* in, nor *actually connected* with the *movement* of a train, and therefore were not permitted or required to be or remain on duty for a longer period than sixteen hours while actually engaged in, or connected with, the movement of said trains.

REASONABLE CONSTRUCTION.

Furthermore, in constructing an act intended to promote the protection of life and property endangered by the movement of trains, which, as we have shown, is the purpose of this act, it must be given a reasonable construction to that end, and not a construction that would work great hardships, cripple the motive power of the company, and retard the prompt movement of trains, without adding anything to the protection of life and property sought to be promoted by the act. In *Baltimore & O. R. Co. v. Interstate Commerce Commission*, above, the court after pointing out the objects and purposes of the act, said:

“And in imposing restrictions having *reasonable relation to this end* there is no interference with liberty of contract as guaranteed by the Constitution.”

The evidence conclusively shows that when a train crew, with a modern engine, fails to reach terminals or destinations before the expiration of the sixteen-hour period and ties up the train on a siding in order to comply with the law, it is necessary to have a watchman take charge of the engine; if that is not done and a little fire is not kept in the engine and water, in the boiler, the engine becomes useless, is hauled as dead freight to a terminal, and in many cases before it can be so hauled,

the drive wheels have to disconnected, etc. (Tr. pp. 26 and 39.)

Davis, the engineer of extra No. 1633, testified as follows:

“The duty of a person who is watching the engine during the time the train is tied up, is to keep enough water in the boiler and enough fuel in to keep up steam to pump the water from the tank into the boiler. If an engine was allowed to die, or if the fire was allowed to go out entirely after the eight hours rest was up you couldn’t move the engine until you got water into the boiler and fire enough to make steam. If the water in the meantime, by reason of leaking out of the boiler, or any other reason, had gotten below the level of the crown sheet, the top of the fire-box, you could not fire up the engine and pump water into the boiler. If that condition arose, that engine before you could put it into use, would have to be brought into some terminal point where we could get fuel and water. In the event the engine was dead you would have to take down the engine, disconnect the drive wheels from the piston rod, as there is no way of lubricating the valves and cylinders, which are lubricated from a lubricator or a cup that works by steam. So that if you had no steam you would have to disconnect the engine.” (Tr. p. 39.)

We submit that a construction of the law which will prevent a railway company from protecting its equipment, when tied up, so as to avoid a practical suspension of operation for the time being and future delays in the movement of trains, by using a member of the crew to watch the engine until a suitable person can be procured to replace him, is unreasonable and not in harmony with the true intent of the law. Particularly is this so where the duties of a watchman of an engine, standing on a side track, are such that they have no relation to the actual movement of trains, and in no way lessen the safety to life and property involved in the movement thereof.

The following language from the opinion of Chief Justice White in *Standard Oil Co. v. United States*, 221 U. S. 1, 55 L. Ed. 619, applies with equal force in construing this statute.

“c. And as the contracts or acts embraced in the provision were not expressly defined, since the enumeration addressed itself simply to classes of acts, those classes being broad enough to embrace every conceivable contract or combination which could be made concerning trade or commerce or the subjects of such commerce, and thus caused any act done by any of the enumerated methods anywhere in the whole field of human activity to be illegal if in restraint of trade, *it inevitably follows that the*

provision necessarily called for the exercise of judgment which required that some standard should be resorted to for the purpose of determining whether the prohibition contained in the statute had or had not in any given case been violated. Thus not specifying, but indubitably contemplating and requiring a standard, it follows that it was intended that the *standard of reason* which had been applied at the common law and in this country in dealing with subjects of the character embraced by the statute was intended to be the measure used *for the purpose of determining whether, in a given case, a particular act had or had not brought about the wrong against which the statute provided.* * * *

“If the criterion by which it is to be determined in all cases whether every contract, combination, etc., is a restraint of trade within the intendment of the law, is the direct or indirect effect of the acts involved, then of course the *rule of reason becomes the guide*, and the construction which we have given the statute, instead of being refuted by the cases relied upon, is by those cases demonstrated to be correct. This is true, because, the construction which we have deduced from the history of the act and the analysis of its test is simply that in every case where it is claimed that an act or

acts are in violation of the statute, *the rule of reason*, in the light of the principles of law and the public policy which the act embodies, must be applied.” (Italics ours.)

The same court, in the case of Church of Holy Trinity v. United States, 143 U. S. 457, 36 L. Ed. 226, also said:

“Again, another guide to the meaning of a statute is found in the evil which it is designed to remedy; and for this the court properly looks at contemporaneous events, the situation as it existed, and as it was pressed upon the attention of the legislative body.”

“* * * Yet it is contended that such was in effect the meaning of this statute. The construction invoked cannot be accepted as correct. It is a case where there was presented a definite evil, in view of which the Legislature used general terms with the purpose of reaching all phases of that evil, and thereafter, unexpectedly, it is developed that the general language thus employed is broad enough to reach cases and acts which the whole history and life of the country affirm could not have been intentionally legislated against. It is the duty of the courts, under those circumstances, to say that however broad the language of the statute may be, the act, although within the letter, is not within the intention of the

Legislature; and therefore cannot be within the statute.”

Plaitiff cited in the District Court the case of United States v. Missouri Pac. Ry. Co., 206 Fed. 847, but it is clearly distinguishable. The facts involved there are so different from those presented here, that even if District Judge Pollock’s construction of the law in that case is correct, it is not in point here. The question considered there is stated by the court as follows:

“Shall the time spent by the fireman as watchman in charge of his engine being drawn by aonther engine to the terminal station be computed in the hours of service as contemplated by the statute?”

As construed by Judge Pollock, the primary intent of the act is to give the employee rest and relaxation after being on duty sixteen consecutive hours, regardless of the character of his work, but we respectfully insist that such is not the true intent of the act, and was not so construed by the supreme court in *Baltimoer & O. R. Co. v. Interstate Commerce Commission*, above.

Furthermore, great stress is laid by Judge Pollock in the fact that the engine of which the fireman had charge, as watchman, was in a *moving train* while so in his charge, and, in this connection, said:

“Looking alone to the safety of the employe

and others, it is evident the nature of the duties required of such watchman, if from loss of vigilance through exhaustion or sleep, he should permit the water in the boiler to be entirely consumed, the danger from *wreck of the train* or other disaster by explosion involving himself and *others is apparent.*" (Italics are ours.)

It is made evident, however, from the testimony of Engineer Davis (Tr. p. 39, quoted above) that where one engine is drawn by another, the watchman in charge of it is practically required to *run* such engine, "as there is no way of lubricating the valves and cylinders which are lubricated from a lubricator or cup that works by steam." In such a case he is required to keep up steam for the purpose of lubricating the valves and cylinders which are *in motion*, the same as if the engine were hauling the train. Whereas, when the engine is left standing on a side track, he is only required to keep a slight fire sufficient to generate steam to pump water into the boiler in case it should leak out.

An engine hauled in a moving train may possibly endanger life and property on such train when it is necessary for a person in charge of such engine to keep up steam and has already been on duty sixteen hours.

There may be some merit in the contention that under such circumstances a person in charge of an

engine in a moving train is actually *connected* with the movement of such train, although Judge Pollock does not pretend to be certain about it. He says:

“While it is quite clear a watchman so in charge of an engine has no control over the train movement, hence is not actually engaged in such movement, it is not so clear that he is in no manner connected with the movement of the train.”

With all due deference and respect to the opinion of Judge Pollock, we believe that he has given to the word “movement” a meaning not intended by congress. In other words, we cannot agree to the proposition that a person riding in an engine, hauled in a train exactly the same as a caboose or box car is hauled, is connected with the *movement* of such train within the meaning of the act. However, whether Judge Pollock’s construction of the law and its applicability to the facts in that case are correct or not, we submit that it is an unreasonable construction of the law to say that a watchman in charge of an engine *tied up on a side track*, is *actually connected* with the *movement* of a train during such time.

For the reason above stated we contend that in the case at bar, the court should have directed a verdict in favor of defendant on each cause of action, upon the first ground stated in its motion for a directed verdict.

VARIANCE BETWEEN ALLEGATIONS AND PROOF.

This is a penal law and the complaint must be strictly construed. In each cause of action it is charged that the defendant “required and permitted its certain *fireman* and employee * * * to be and remain on duty *as such* for a longer period than sixteen consecutive hours,” but the proof shows that neither fireman was on duty *as such*, that is, *as fireman*, for a period in excess of fifteen and a half hours. After that time they were employed *as watchmen*—a wholly different service and one in which the employee is not actually engaged in, or connected with, the movement of any train.

For instance, if the crew had reached a terminal in fifteen and a half hours, and the engineer or firemen then had gone into the roundhouse and worked several hours as hostler, and a complaint were filed charging that the company required and permitted said fireman, or or engineer, to be and remain on duty *as such*, for more than sixteen hours, would proof of their work as hostler sustain such a charge? We can see no distinction between such a case and the case at bar. We submit that the second ground of defendant’s motion for a directed verdict, on each cause of action, should have been sustained.

II.

The next question presented is whether the facts in this case show the delay necessitating a watchman on the engine was caused by an act of God within the exceptions contained in section 3 of said act, which reads as follows:

“Provided, That the provisions of this Act shall not apply in any case of casualty or unavoidable accident or the act of God; nor where the delay was the result of a cause not known to the carrier or its officer or agent in charge of such employee at the time said employee left a terminal, and which could not have been foreseen.”

(1909 Supplement U. S. Statutes Annotated,
p. 583.)

We contend that the facts of the case bring it within both exceptions mentioned in the Act.

ACT OF GOD.

The evidence shows that the snow storm which broke down the wires and caused the delays was so unusually violent and unprecedented in character in that section of the country and in that season of the year as to be an Act of God within the accepted meaning of that term.

In the opinion in the case of *Gleason v. Vir-*

ginia Midland Ry. Co., 140 U. S. 445, 35 L. Ed. 458, the court said:

“There was no evidence that the rain was of extraordinary character, or that any extraordinary results followed it. It was a common, natural event; such as not only might have been foreseen as probable, but also must have been foreknown as certain to come. Against such an event it was the duty of the Company to have guarded. *Extraordinary floods, storms of unusual violence*, sudden tempests, severe frosts, great droughts, lightnings, earthquakes, sudden deaths and illnesses, have been held to be ‘acts of God;’ but we know of no instance in which a rain of not unusual violence, and the probable results thereof in softening the superficial earth, have been so considered.” (Italics ours.)

Had the evidence in the case just cited disclosed a storm such as was shown in this case, it would have been held an act of God. The following cases hold that unusual or extraordinary *snow storms*, delaying the movement of trains, are acts of God:

Balletine v. Mo. Ry. Co., 39 Am. Dec.
(Mo.) 315;

Black v. C. B. & Q. Ry. Co., 46 N. W.
(Neb.) 428.

In the latter case the court said:

“The rule seems to be that a carrier of live-

stock is an insurer of the safety of the property while it is in his custody, subject to certain well-defined exceptions. He is not liable for injuries resulting unavoidably from the nature and propensities of the property, nor for damages resulting from the act of God, or the public enemy. The evidence brings this case within the exception to the general rule. An unprecedented snowstorm, of such violence as to obstruct the moving of trains, falls within the term 'act of God.' ”

See also:

1 Words and Phrases, under snow and storm, p. 125;

1 Cyc. 758, and cases cited.

“A storm, flood or freshet to constitute an act of Providence need not be unprecedented, if it is unusual, extraordinary and unexpected.”

People v. Utica Cement Co., 25 Ill. App. 159.

The term “act of God” may be applied to the breaking of an electric wire by a storm.

Cook v. Wilmington City Electric Co., 32 Atl. (Del.) 643.

III.

If this snow storm was not so unusual in character as to constitute an act of God within the accepted meaning of that term, still the evidence clearly brings the case within the other exception mentioned in said proviso, as it conclusively shows that the failure to reach the terminal within the sixteen hours was the result of the snow breaking the wires used in sending orders controlling the movement of such trains.

It is further shown by the undisputed evidence that such condition of the wires was not known and could not have been known at the time the trains left the terminal at Missoula. In fact it was not known at that time that a violent snow storm unusual in character would be encountered. Despatcher Thompson testified as follows:

“At the time 1633 was ordered out on the afternoon of the first there was not any weather condition at Missoula, or reports along the line, that would indicate difficulties in the moving of these trains. The weather report there shows that the temperature was some place between 42 and 60. Up to the time, and prior to the time, No. 1654 left there at about eleven o'clock, we had no report of wire trouble. At the time that each of those trains were ordered out we were not able to foresee any unusual

condition—no other than could be controlled by the reduction of tonnage, for instance.” (Tr. p. 46.)

While it has been decided that the proviso of section 3 “does not exempt a railroad company for liability for delays resulting from things of “common occurrence,” such as hot boxes, engines getting out of order, coal being bad,” etc. (Washington P. & C. Ry Co. vs. Magruder, 198 Fed. 218) it is manifest that a snow storm breaking down miles of telegraph wires and poles, and of such a nature that employes, who had worked in the same territory from five to fourteen years, had never seen anything like it (Tr. pp. 25, 33, 38, 41 and 48) was certainly not a thing of “common occurrence,” nor one that could have been known or foreseen by the officer or agent in charge of such crews at the time they left the terminal.

Why the breaking of the wires so materially delays freight trains and particularly extra freights is explained by Despatcher Thompson, as follows:

“Q. Just explain, briefly, Mr. Thompson, how it is that passenger trains can move more rapidly when the wires are down than freight trains.

“A. Well, the point is this: That passenger trains as specified here have a given time and when he comes along he can go on that time and move right down the lien, orders

or no orders; and a freight train, extra, must have orders to move it; it cannot leave terminals without orders of some kind.

“When it leaves any place, he must first leave a terminal and he must have orders to leave a terminal, and when he gets into the next siding, he has gone the limit, and when he gets there he has to have another order.” (Tr. p. 55.)

Therefore, if this case comes within either of the exceptions, it necessarily follows that the law did not apply to either of said train crews, and they could legally have continued on to the terminal at Helena after the sixteen hour period had expired.

If the entire crew could legally have come on to the terminal with the train then why could not one member of such crew continue as watchman of the engine without violating the law? The United States District Attorney admitted that such result would follow if the delays were the result of the snow storm (Tr. p. 52.)

In *Black v. Charleston & W. C. Ry Co.*, 69 S. E. (N. C.) 230, the court construed the Federal Sixteen-hour Law, which had been pleaded by defendant as an excuse for not carrying plaintiff to his destination within a reasonable time. Defendant claimed that it had to tie up the train to comply with such law. The court, in discussing the defense, said:

“Moreover, by its terms, the act does not apply in cases of casualty, unavoidable accident, or the act of God; nor where the delay was the result of a cause not known to the carrier, when the employes left a terminal, and which could not have been foreseen. Therefore, *if the delay was due to any of said causes, it would not have been a violation of the act of Congress to permit the crew to remain on duty more than 16 hours, and, in that event, the act can be no defense.*”

Plaintiff contended in the district court, and may do so here, that when extra No. 1654, involved in the first cause of action, arrived at Avon at eleven a. m. May 2, the caboose and engine could have been detached and the crew taken to Helena within the sixteen hour period, thus avoiding the necessity of putting a watchman in charge of the engine, had it not been for the fact that they were held at Avon by a flagman on passenger train No. 3, which compelled them to wait there to meet an extra west bound freight which did not arrive until one fifteen p. m. when it was too late to reach Helena with the engine and caboose within sixteen hours.

This is merely begging the question. A flagman would not have been used on No. 3 if the wires had not been down, nor would they have been compelled to wait at Avon after the arrival of the extra west if

the wires had been up. In emergency cases, such as the wires being down, it is customary to move certain trains by means of flagmen, but, of course, with the extra delays necessarily incident thereto (Tr. pp. 32 and 56.)

Conductor Shaw testified as follows:

“Q. Why was it that this west-bound train sent a flagman on No. 3 to notify you—wasn’t Avon a telegraph station?

“A. No wires; could get no communication with the dispatcher.” (Tr. p. 35.)

So the failure to get to Helena with the caboose and engine is traced back to the original cause, namely, the snow storm breaking the wires down.

Also the fact that the operator at Helena started out an extra west bound freight and the fact that the conductor on said extra west placed a flagman on passenger train No. 3 when it passed, who flagged extra east No. 1654 at Avon, are wholly immaterial. They were emergency matters resulting from the unusual and extraordinary conditions which existed, and such conditions existed only because of the wire failure, which prevented transmission of orders covering the movement of trains from the dispatcher’s office at Missoula, from which point all orders for the movement of trains between Missoula and Helena, were issued (Tr. p. 44.)

As the wire failure was due solely to the snow storm we are again back to the real cause of the

delays—the extraordinary snow storm which was not known or could not have been foreseen at the time the trains left the terminal. Therefore the fourth ground of defendant's motion for a directed verdict, on each cause of action, should have been sustained.

We respectfully submit that the court erred in directing a verdict in favor of plaintiff and in rendering judgment thereon, and that the same should be reversed and the case dismissed.

Respectfully submitted,

GUNN, RASCH & HALL,

Attorneys for Plaintiff in Error.

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United States Circuit Court of Appeals, Ninth Circuit.

NORTHERN PACIFIC RAILWAY COMPANY, a corporation, plaintiff in error, <i>v.</i> UNITED STATES OF AMERICA, DEFENDANT in error.	}	No. 2343.
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BRIEF AND ARGUMENT FOR DEFENDANT IN ERROR.

STATEMENT OF CASE.

This suit was brought by the United States against the Northern Pacific Railway Company to recover penalties for violations of the act of Congress, commonly known as the Federal hours of service law (34 Stat. L., 1415). The complaint is in 2 counts, each charging a violation of the statute in that the defendant required and permitted one of its employees to remain on duty for a longer period than 16 consecutive hours, the period of consecutive service being 24 hours and 30 minutes in the case of Fireman B. D. Drew, and 24 hours and 20 minutes in the case of Fireman V. Jenson. The former was alleged to have been on duty at and between stations of Missoula, Mont., and Avon, Mont., and to have been engaged in

and connected with the movement of defendant's freight train, extra 1654, while the latter was alleged to have been on duty at and between the stations of Missoula, Mont., and Elliston, Mont., and to have been engaged in and connected with the movement of defendant's freight train, extra 1633, both trains being engaged in the movement of interstate traffic.

By its answer defendant pleaded as to count 1 that after train extra 1654 had left its terminal, Missoula, it encountered storm and snow fall of such unusual and unprecedented violence that when it arrived at the station of Avon the telegraph and telephone lines were down in both directions, destroying all means of communication with the operators and dispatchers at the stations in both directions from said station of Avon; that the fact that snow to the depth of 15 inches had fallen and was packed down on defendant's tracks, together with the fact that no means of communication were available from said station of Avon, made it impossible to proceed with the train, and the train was left at that station, and the crew, including Fireman B. D. Drew, released from duty in connection with the movement of the train, having been on duty 15 hours and 30 minutes; that Fireman Drew was not thereafter on duty in connection with the movement of said train, but was merely watching and guarding the engine of said train while the train remained tied up and standing still at the station of Avon.

Similar circumstances and conditions were pleaded in defendant's answer to count 2 as to the service of Fireman Jensen on train extra 1633, the train in that instance being tied up at Elliston, Mont.

It was further alleged that the delay in the movement of said trains and the necessity for the watching and guarding of said engines by said firemen were occasioned by, and due to, the act of God and the result of causes which were not known to said defendant company, its officers or agents in charge of said firemen at the time they left said terminal at Missoula, and which could not have been foreseen.

At the trial certain facts which were stipulated by parties as to the two counts of the complaint, and which are briefly summarized as follows, were read to the jury and the plaintiff then rested:

Count 1.—Fireman B. D. Drew reported for duty at 10 p. m., May 1, 1912, and was thereafter until 1.15 p. m., May 2, 1912, at all times performing service or held responsible for the performance of service in connection with the movement of train extra 1654 between Missoula and Avon. At 1.15 p. m., May 2, 1912, at Avon, the train crew, with the exception of fireman Drew, was relieved from all duty in connection with said train on account of the so-called Federal 16-hour law, but said fireman Drew was required to remain and did remain in attendance upon the engine of said train as watchman until 10.30 p. m., May 2, 1912. His duty as watchman was to keep up a small fire in the engine, so as to generate sufficient steam to pump water into the boiler to prevent the water

from getting below the level of the crown sheet; to pump such water into the boiler when necessary for such purpose; and to prevent the engine from becoming dead.

Count 2.—Fireman V. Jenson reported for duty at 3.40 p. m. May 1, 1912, and was thereafter until 7 a. m. May 2, 1912, at all times performing service, or held responsible for the performance of service in connection with the movement of train extra 1633, between Missoula and Elliston. At 7 a. m. May 2, 1912, at Elliston, the train crew, with the exception of Fireman Jenson, was released from all duty in connection with said train on account of the so-called Federal 16-hour law, but said Fireman Jenson was required to remain and did remain in attendance upon the engine of said train as watchman until 4 p. m. May 2, 1912. Fireman Jenson, as watchman, performed similar duties to those performed by Fireman Drew.

Defendant introduced further testimony in support of its answer, and at the close of all the evidence, each party having requested a directed verdict in its favor, the court directed the jury to return a verdict in favor of the plaintiff on each cause of action. The action of the court in granting the motion of the plaintiff and refusing that of the defendant is here assigned as error.

QUESTIONS INVOLVED.

This case presents the following questions for the determination of this court:

1. Is a locomotive fireman on duty within the meaning of the hours-of-service act if, after the expiration of approximately 16 consecutive hours in road service as fireman, he is required and permitted for an additional period of time to remain on the engine for the purpose of watching and guarding same while the train is tied up and standing still on a sidetrack?

2. Does the evidence establish the fact that the delay in the movement of the trains in question and the necessity for the watching and guarding of the engines were occasioned by the act of God, and were the result of causes not known to the defendant or its officers or agents in charge of said employees at the time said employees left a terminal, and which could not have been foreseen?

3. Did the court below err in directing a verdict for the plaintiff?

THE STATUTE.

[34 Stat., 1415.]

AN ACT To promote the safety of employees and travelers upon railroads by limiting the hours of service of employees thereon.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the provisions of this act shall apply to any common carrier or carriers, their officers, agents, and employees, engaged in the transportation of passengers or property by railroad in the District of Columbia or any Territory of the United States,

or from one State or Territory of the United States or the District of Columbia to any other State or Territory of the United States or the District of Columbia, or from any place in the United States to an adjacent foreign country, or from any place in the United States through a foreign country to any other place in the United States. The term "railroad" as used in this act shall include all bridges and ferries used or operated in connection with any railroad, and also all the road in use by any common carrier operating a railroad, whether owned or operated under a contract, agreement, or lease; and the term "employees" as used in this act shall be held to mean persons actually engaged in or connected with the movement of any train.

SEC. 2. That it shall be unlawful for any common carrier, its officers or agents, subject to this act to require or permit any employee subject to this act to be or remain on duty for a longer period than sixteen consecutive hours, and whenever any such employee of such common carrier shall have been continuously on duty for sixteen hours he shall be relieved and not required or permitted again to go on duty until he has had at least ten consecutive hours off duty; and no such employee who has been on duty sixteen hours in the aggregate in any twenty-four-hour period shall be required or permitted to continue or again go on duty without having had at least eight consecutive hours off duty: *Provided*, That no operator, train dispatcher, or

other employee who by the use of the telegraph or telephone dispatches, reports, transmits, receives, or delivers orders pertaining to or affecting train movements shall be required or permitted to be or remain on duty for a longer period than nine hours in any twenty-four-hour period in all towers, offices, places, and stations continuously operated night and day, nor for a longer period than thirteen hours in all towers, offices, places, and stations operated only during the daytime, except in case of emergency, when the employees named in this proviso may be permitted to be and remain on duty for four additional hours in a twenty-four-hour period on not exceeding three days in any week: *Provided further*, The Interstate Commerce Commission may, after full hearing in a particular case and for good cause shown, extend the period within which a common carrier shall comply with the provisions of this proviso as to such case.

SEC. 3. That any such common carrier, or any officer or agent thereof, requiring or permitting any employee to go, be, or remain on duty in violation of the second section hereof, shall be liable to a penalty of not to exceed five hundred dollars for each and every violation, to be recovered in a suit or suits to be brought by the United States district attorney in the district court of the United States having jurisdiction in the locality where such violation shall have been committed; and it shall be the duty of such district attorney to bring such suits upon satisfactory information being

lodged with him; but no such suit shall be brought after the expiration of one year from the date of such violation; and it shall also be the duty of the Interstate Commerce Commission to lodge with the proper district attorneys information of any such violations as may come to its knowledge. In all prosecutions under this act the common carrier shall be deemed to have had knowledge of all acts of all its officers and agents: *Provided*, That the provisions of this act shall not apply in any case of casualty or unavoidable accident or the act of God; nor where the delay was the result of a cause not known to the carrier or its officer or agent in charge of such employee at the time said employee left a terminal, and which could not have been foreseen: *Provided further*, That the provisions of this act shall not apply to the crews of wrecking or relief trains.

SEC. 4. It shall be the duty of the Interstate Commerce Commission to execute and enforce the provisions of this act, and all powers granted to the Interstate Commerce Commission are hereby extended to it in the execution of this act.

SEC. 5. That this act shall take effect and be in force one year after its passage.

Approved, March 4, 1907, 11.50 a. m.

ARGUMENT.

I.

Is a locomotive fireman on duty within the meaning of the hours-of-service act if, after the expiration of approximately 16 hours in road service as fireman, he is required and permitted for an additional period of time to remain on the engine for the purpose of watching and guarding same while the train is tied up and standing still on a sidetrack?

The first section of the statute makes its provisions applicable to common carriers and employees engaged in the transportation of passengers or property by railroad in interstate commerce, and provides that "the term 'employees' as used in this act shall be held to mean persons actually engaged in or connected with the movement of any train."

Section 2 makes it unlawful for any common carrier subject to this act to require or permit any employee subject to this act to be or remain on duty for a longer period than 16 consecutive hours, and that whenever any such employee shall have been continuously on duty for 16 hours he shall be relieved and not required or permitted again to go on duty until he has had at least 10 consecutive hours off duty.

The plaintiff in error takes the position that a fireman watching an engine under the circumstances outlined is not, while so employed, engaged in or connected with the movement of any train and is therefore not "on duty" within the meaning of this statute.

It is submitted that this is not a proper construction of this statute. The contention made by the plaintiff in error is based on a misconception of the meaning of the clause in the act defining the term "employees."

The definition of the word "employees" in the first section of the act is merely for the purpose of limiting the *class of employees* to which the act applies, namely, those employees who are engaged in or connected with the movement of trains, as distinguished from other employees of a common carrier engaged in interstate commerce whose duties may have no relation to interstate commerce. This is clear from the decision of the Supreme Court of the United States in the case of *B. & O. R. Co. v. Interstate Commerce Commission* (221 U. S., 612), where the court in construing this statute said:

The statute, therefore, in its scope, is materially different from the act of June 11, 1906, chapter 3073, 33 Stat., 232, which was before this court in the *Employer's Liability cases* (207 U. S., 463). There, while the carriers described were those engaged in the commerce subject to the regulating power of Congress, it appeared that if a carrier was so engaged the act governed its relation to every employee, although the employment of the latter might have nothing whatever to do with interstate commerce. In the present statute, the limiting words govern the employees as well as the carriers.

The second section of the act does not limit the *time* of service to time *wholly used* in the movement of a train. For men whose duties *generally* relate to or are connected with train movement *no* service in excess of the statutory period is permitted. If an employee is that *kind* of an employee defined by the act, then he is subject to the provisions of the act. The second section of the statute provides that no employee shall be required to be "on duty" for a longer period than 16 consecutive hours. There is here no limitation of the *kind* of duty.

The courts have held that the expression "on duty" in this statute means "to be actually engaged in work or to be charged with present responsibility for such, should occasion for it arise." (*U. S. v. D. & R. G. R. Co.*, 197 Fed., 629; *U. S. v. Illinois Central R. Co.*, 180 Fed., 630.)

In the case first cited, a train was held on a sidetrack for 55 minutes waiting for the arrival of another train, the time of its arrival being uncertain. During the period of waiting on the sidetrack the switch was locked, the headlight of the locomotive was extinguished, the conductor was reading, and the brakemen were asleep. The court held that these employees were "on duty" within the meaning of this statute during this period, and its decision was cited with approval by the Supreme Court of the United States in the recent decision in the case of

M. K. & T. Ry. Co. of Texas v. United States (231 U. S., 112). In this case the Supreme Court said:

One of the delays was while the engine was sent off for water and repairs. In the meantime the men were waiting, doing nothing. It is argued they were not on duty during this period, and that if it be deducted, they were not kept more than 16 hours. But they were under orders, liable to be called upon at any moment, and not at liberty to go away. They were none the less on duty when inactive. Their duty was to stand and wait. (*U. S. v. Chicago, M. & P. S. Ry. Co.*, 197 Fed., 624, 628; *U. S. v. D. & R. G. R. Co.*, 197 Fed., 629.)

The statute in terms prohibits an employee being required or permitted to remain on duty for a longer period than 16 consecutive hours, and further provides that when an employee has been on duty for 16 consecutive hours he shall be relieved and not required or permitted again to go on duty until he has had 10 consecutive hours off duty.

Bearing in mind the language of the statute, let us suppose a case of a fireman who has been on duty for 16 consecutive hours in connection with the actual physical movement of a train, and who is then required to act as engine watchman for an additional period of 10 hours. Plaintiff in error would contend that during the 10 consecutive hours such fireman was watching the engine he was not "on duty" within the meaning of the statute. Now, if plaintiff in error's contention is sound and this fireman was not "on duty" during the time he was watching the

engine, he must have been "off duty." Having been "off duty" for 10 consecutive hours, he could then immediately be sent out on a train for another 16 hours, then required to watch the engine for 10 consecutive hours more, and so on indefinitely, and thus the purpose of this statute would be absolutely defeated.

Service of more than 16 consecutive hours being prohibited by the statute, *no other requirement* of the carrier can justify it in permitting any employee to remain on duty in excess of that period. This seems to have been determined by the decision of the Supreme Court of the United States in the case of *B. & O. R. Co. v. Interstate Commerce Commission* (221 U. S., 612), in which case Justice Hughes said:

If, then, it be assumed, as it must be, that in the furtherance of its purpose Congress can limit the hours of labor of employees engaged in interstate transportation, it follows that this power can not be defeated either by prolonging the period of service through *other requirements of the carriers* or by the commingling of duties relating to interstate and intrastate operation. [*Our italics.*]

When for the statutory period service is rendered which *does* relate to the movement of trains, the fact that *excess* service may *not* relate to the movement of trains does not excuse the carrier for permitting such excess service.

When the full period of permitted service under the act has elapsed, no detention of the employee by the

carrier for work, attendance, or service of any kind or character beyond that period is permissible.

Of what avail is the limitation of the hours of service if, after service to the permitted limit, service of any other kind or character is permitted beyond that limit?

The Government contends that any service watching an engine after the 16-hour limit of service is a service of an important character having a direct relation to the safety of travel. And this is so even if the engine so watched is upon a sidetrack for the whole period of extra service.

The possibility of an explosion of a locomotive boiler caused by letting its water get too low even when such a locomotive is upon a sidetrack is a menace to trains passing on the main track. So the fact that the engine is on a sidetrack ought not to render such extra service negligible in reckoning hours of service.

The position of the plaintiff in error on the proposition here under discussion is very clearly stated in the opinion of the court in the case of *United States v. Great Northern Ry. Co.* (206 Fed., 838). Judge Dietrich there said:

From this abstract of the facts, as stipulated, it appears that Burgen was actually engaged as fireman a little less than 16 hours, but as fireman and engine watchman he was on duty continuously for 24 hours; and the question for determination, therefore, is whether, under the circumstances, his service as engine watch-

man brings the case within the statute. Conceding, as urged, but not deciding, that Burgen's service as engine watchman was not directly or indirectly connected with the movement of the train, he was primarily a locomotive fireman, and as such an "employee" as defined by the act, and was therefore subject to its operation. The defendant takes the position that by temporarily turning aside from his regular duty the employee becomes and for the time being remains exempt; but to this view I am unable to assent. While the statute is susceptible to such a construction, its prohibition is not, in terms at least, limited to service having to do directly or indirectly with the movement of trains. The language of the second section is: "It shall be unlawful * * * to permit any employee subject to this act to be or remain on duty for a longer period than 16 consecutive hours." There is here no express limitation of the operation of the act to a specific duty or class of duties; the limitation is rather to a class of employees, namely, those "actually engaged in or connected with the movement" of trains. The act must therefore be construed and, being remedial in its nature, it must receive such construction as will give to its general purpose reasonable effect. (*United States v. Kansas City S. Ry. Co.*, 189 Fed., 471; *United States v. Missouri Pacific Ry. Co.* (decided by District Court for District of Kansas, Mar. 22, 1913).) Now, the defendant's position is that the time Burgen was engaged in watching the engine is not to be counted, because during such

period he was performing a duty having no connection with the movement of any train. Plainly in that view the test, and the only test, is the relation of the specific service to the movement of trains. Logically, therefore, it is wholly immaterial whether the service as watchman follows or precedes the service as fireman or intervenes. It has no more connection with the movement of trains in the one case than in the other, and if want of such connection operates to exclude it from consideration it is to be excluded the same in one case as in another. But clearly the purpose of the act could in part be very easily frustrated if an employee could be lawfully kept on watch for 8 hours and then immediately be required to fire an engine in transit for 15 hours and 59 minutes, or if he could be required to fire for 8 hours, then watch for 8 hours, and then fire again for 8 hours, all consecutively. It is not to be assumed that such a contingency, which is entirely possible under the construction urged by the defendant, was contemplated in the passage of the act. True, the violation of the spirit of the statute is more apparent in such a case, where the service precedes the service as fireman, than where, as here, it follows such service, but the difference is one of degree only, and the courts can not with nicety distinguish between service which materially impairs and that which impairs only to an inappreciable extent the efficiency of a trainman. That 24 hours of continuous service without sleep is unnatural can not be gainsaid,

and if persisted in for any considerable length of time, even with liberal intervals of rest, it might injuriously affect the trainman's efficiency is not unreasonable to believe. I can not avoid the conclusion that it was the intent and purpose of Congress that men charged with the responsibility of safely moving trains in interstate commerce should not be required or permitted to work continuously for more than 16 hours at any one time. It has been suggested that the carrier has no power to compel employees to rest, and when given the opportunity for rest they may use the time in laboring upon their own account or for some other employer, but such a contingency is remote in the extreme; at least it is one with which we are not presently concerned. Without further discussion, my conclusion is, that under proper construction of the act locomotive firemen, engineers, conductors, and other members of train crews, being "employees," as that term is defined, can not be permitted to be on duty for more than 16 consecutive hours, regardless of the question whether such duty consists in whole or only in part of work directly connected with the movement of trains. In this view, and upon the facts stipulated, it must be held that the defendant is guilty.

In the case of *United States v. Great Northern Ry. Co.*, No. 705, District Court of Minnesota, decided by Judge Willard, June 4, 1913, on motion of counsel for defendant for verdict in its favor, the following

colloquy took place between counsel for defendant and the court:

The COURT. I will hear you upon that, Mr. Lindlay.

Mr. LINDLAY. It is the contention of the defendant that the use of the fireman to watch the engine, under the circumstances that obtained in this case, is not in violation of the spirit and purposes of the hours of service act. The text of the act, I think, shows that the object and purpose of the act is the safety of the employees and of the traveling public; and in construing the act that purpose should be kept in view, in my opinion, and such construction given as will best subserve the purposes which the act has in view. It is our contention that when a train is taken out of service, when its operation is killed, its movement is ended and it is placed upon either a siding or a passing track, that it is no longer a train in movement, and that the employee who does nothing more than watch the engine is not engaged, within the terms of the act, in connection with the movement of any train.

The COURT. Suppose after a crew had been on service for five hours the train was delayed at a station, say, for five hours, and the crew has absolutely nothing to do during those five hours; would you claim that you can take that five hours out of the 16 hours, and run the employees five hours after the expiration of the 16 hours?

Mr. LINDLAY. Not unless they were definitely relieved. If they were not relieved, you could not.

The COURT. After he has been on duty for 16 hours this fireman is required to watch the engine for four hours more; is it your theory that you can put him on duty again before 10 hours? As I understand it, your theory is that the time does not count that he is not engaged in the movement of a train.

Mr. LINDLAY. Yes, sir.

The COURT. After five more hours have elapsed, is it your theory that you can put him on in five hours again?

Mr. LINDLAY. No, sir.

The COURT. Why not?

Mr. LINDLAY. Here is a practical situation, and by observing this practice which we contend for, it does not put any man in the active charge of a train or operation of a train for more than 16 hours.

The COURT. If you had taken this fireman off the train and put him in the roundhouse or machine shops and worked him 10 hours, could you put him back again upon a train?

Mr. LINDLAY. No, sir.

The COURT. Why not; if your theory is correct?

Mr. LINDLAY. Because it might be a violation of the theory or the purpose of the act.

* * * * *

The COURT. When we come to the determination of the question as to whether these firemen while they were watching the engine were connected with or engaged in the movement or operation of any train, we come to a question which has already been decided by this court, both by Judge Morris and by myself. I have

held several times, and I think that Judge Morris has held once, that such a fireman is engaged in the movement or operation of a train, and does come within the law. I have held, though I do not know whether Judge Morris has so held, that there can be a prosecution not only for such a violation of this law, but for a failure to report the violation, which seems to me to be an extremely hard case, because it appeared that the railroad company did not understand that the use of the fireman was a violation of the law. Notwithstanding that, I felt compelled to impose a penalty. So that, in order to decide this case for the defendant I would have to overrule not only my own decision, but that of Judge Morris, which I do not feel inclined to do, because I can not see any reason for so doing.

I am still of the opinion that the use of these firemen does come within the meaning of the law; that they were connected with the movement or operation of a train while they were watching these engines. To be sure the trains were standing still. If the time is to be eliminated while the engine is standing in the yard, then I do not see why the time should not be taken out when a train is standing still at a station, and a brakeman is standing there and has nothing to do.

I am satisfied that these men come within the law relative to the movement and operation of a train and are connected with it. The evidence is undisputed that they were employed and were required to work more than 16 hours. It is a matter of no signifi-

cance as to the severity of the work, whether it was light or arduous. The question to be determined is whether they were required to be on duty. That they were required to be on duty appears from the testimony of the men themselves and from the testimony of other witnesses engaged in the service of the railroad company.

* * * * *

Though not at all essential to the maintenance of the Government's contention that the general duties of the employees here in question were such as to bring them within the act, it may be contended fairly that, in a broad way, the care of a standing train, completely made up, in the time intervening between movements is a duty which is "connected with" the movement of trains.

In the case of *United States v. Missouri Pacific Ry. Co.* (206 Fed., 847), Judge Pollock said:

While the question presented is, so far as I find, of first impression, yet considering the remedial nature and humane purpose of the act, the character of the duties imposed upon such watchman as stipulated by the parties, and all the facts and circumstances presented by the record to which consideration should be given, I am forced to the conclusion the time so spent by a locomotive fireman in watching his engine must be computed as hours of service within the purview of the act, and for the following, among other reasons which might be given:

The humane feature of the statute being considered, it must be thought the Congress

intended, at or before the expiration of the 16-hour period of service provided therein, an employee engaged in the movement of the train would, from exhaustion of body and mind, be in need of relaxation and rest, freed from all responsibility and care for the safety of himself and others. That the cab of a moving engine in which such watchman is required to ride is not such place as in the absence of any duty to be performed is conducive to that rest and relaxation required by the statute is a matter of common experience and knowledge. However, when to this self-evident fact, as in this case, there is super-added the duties imposed on one so situated, as by the parties stipulated, the question of relaxation, rest, and sleep required by the statute must be almost, if not altogether, impossible.

Again, aside from the humane purpose of the act, regarded from the standpoint of the welfare of the employee himself, and looking alone to the safety of the employee and others, it is evident the nature of the duties required of such watchman, if from loss of vigilance through exhaustion or sleep he should permit the water in the boiler to be entirely consumed, the danger from wreck of the train or other disaster by explosion, involving himself and others, is apparent.

All things considered, I am of the opinion it must be held such watchman is in a manner actually engaged in connection with the movement of the train, and to such extent as brings the time so consumed within the hours of

service as contemplated by the act. If such construction of the statute is correct, and it shall impose a burden too severe on railroad companies, the remedy lies with the lawmaking power, not the courts.

In the following additional cases the question here under discussion has been passed upon by the district courts, and we know of no instance in which it has been held that these engine watchmen were not on duty within the meaning of this statute:

U. S. v. M., St. P. & S. S. M. Ry., District of Minnesota, April 1, 1913.

U. S. v. S. P. L. A. & S. L. R. Co., Southern District of California, October 3, 1913.

II.

Does the evidence establish the fact that the delay in the movement of the trains in question, and the necessity for the watching and guarding of the engines were occasioned by the act of God and were the result of causes not known to the defendant or its officers or agents in charge of said employees at the time said employees left a terminal, and which could not have been foreseen?

By this portion of its answer defendant sought to bring itself within the terms of the proviso of section 3 of the act, which is as follows:

Provided, That the provisions of this act shall not apply in any case of casualty or unavoidable accident or the act of God; nor where the delay was the result of a cause not known to the carrier or its officer or agent in charge of such employee at the time said employee left a terminal, and which could not have been foreseen.

It was alleged that after these trains left Missoula they encountered such unusual snowfall that when they arrived at the stations where they were eventually tied up the wires were down and no means of communication were available in either direction; that because of this fact and on account of the snow it was impossible to proceed with the trains, and the crews, with the exception of the firemen, who were required to watch the engines, were relieved from all duty.

It is further alleged that the delay in the movement of said trains and the necessity for watching and guarding of the engines were due to the act of God and the result of causes which were not known to said defendant company at the time they left said terminal at Missoula, and which could not have been foreseen.

In the first place it is submitted that this portion of the answer has no material bearing on this case. There is really but one question in this case and that is whether these firemen were on duty within the meaning of the statute while they were watching the engines at these stations. In other words, the defense is that when the trains involved arrived at Avon and Elliston, respectively, they found that the wires were down and they were compelled to remain there, and the crews were accordingly relieved from all duty, with the exception of the firemen, who were required to watch the engines. Nothing that happened on the trip caused the rest of the train crews to exceed the 16-hour limit, and the firemen would

not have exceeded it but for the fact that they were required to watch the engines. The real cause of the violation of this statute, if there was one, was the requirement of the carrier that the firemen watch the engines. This was merely a matter of economy and convenience, as shown by the evidence. (Record, pp. 26, 30, 39, 53.)

This was the view of the court in a similar case, *United States v. Great Northern Ry. Co.* (District of Minnesota, *supra*), where the fireman was required to watch the engine after the train had been tied up on a sidetrack and the rest of the crew relieved at the expiration of 16 hours. On the question of admissibility of evidence to show that this train had been delayed before reaching that point by causes named in the proviso, Judge Willard said:

I passed upon the question of the materiality of this evidence when it was offered, and ruled it out on the theory that if an unavoidable accident did occur which delayed a train 5 hours, and I will say for the sake of illustration, the first 5 hours out of the 16 hours, so that the obstruction caused by unavoidable accident was entirely removed and the train started again after 5 hours, that that would not justify a railroad company in running that crew by any number of stations where it could be tied up, or running by a station when the 16 hours had expired. The theory of the defendant is that the delay having been caused by an unavoidable accident for 5 hours, the company had the right to use the crew for so

much longer. I am satisfied that this is an incorrect construction of the statute, and on that theory I ruled it out.

In the case of *United States v. Southern Ry. Co.* (Western District of South Carolina), decided October 30, 1913, not yet reported, Judge Smith held that where a train is delayed by reason of some cause mentioned in the proviso, the hours of service of train employees may be extended in such cases beyond the period fixed in the statute only so far as may be necessary to permit the train to be operated to a point at which the train crew could be relieved. In ruling on defendant's exception to its charge, the court said:

On that I rule that the occurrence of an accident or delay by the act of God or any case of casualty or unavoidable accident while the train is in course of transit from one terminal point to another does not mean that the entire act would be suspended as to that train. To hold that the entire act would be suspended as to that train would be to hold that the 16 hours' limit did not apply to any train between terminals during the progress of whose transit between terminals any delay occurred from the exempting causes named in the statute. The delay might be any number of hours, from 5 to 10, and I hold that the statute does not mean that as to that train the operative period of service is extended from 16 to 21 or 26 hours, according as some delay from the exempting causes may occur whilst the train is in transit. I construe the statute to mean that the hours of service shall be extended in such cases only

so far as may be necessary to permit the train to be operated to a point at which, due regard being had to all the circumstances of the particular case and the character of the train, the train crew could be relieved or be allowed to take the rest required by the statute.

But aside from this, and even assuming that this portion of the answer was material to the issues, there is nothing in the evidence which would justify a finding that the trains in question were delayed by the act of God or as the result of causes not known at the time the trains left a terminal, and which could not have been foreseen.

The burden was on the defendant to bring itself strictly within the letter and spirit of the proviso. The rule of construction is that laid down by Mr. Justice Story in *United States v. Dickson* (15 Peters, 141, 175):

The general rule of law which has prevailed and become consecrated almost as a maxim in the interpretation of statutes is that where an enacting clause is general in its language and objects and a proviso is afterwards introduced, that proviso is construed strictly and takes no case out of the enacting clause which does not fall fairly within its meaning. In short, a proviso carves special exceptions only out of the enacting clause, and those who set up any exception must establish it as being within the words as well as within the reason thereof.

The exceptions which excuse excess service are unforeseen emergencies and accidents of such exceptional and unusual occurrence that they are unavoidable and practically inevitable. In other words, only causes of a grave and serious nature are specified in the proviso as excuses—"casualty," "unavoidable accident," "act of God," and "which could not have been foreseen."

The evidence introduced by defendant may be briefly summarized as follows:

The weather conditions between Missoula and Helena on May 1, 1912, as reported to the dispatcher's office at Missoula, were as follows (Record, p. 45):

4 p. m.: Missoula, cloudy and light rain; Garrison, strong northwest wind, cloudy, calm, 47 above, no rain; Elliston, cloudy, strong northwest wind, 38 above; Blossburg, cloudy, light northwest wind; Helena, cloudy, light northwest wind.

5 p. m., snowing at Blossburg, Drummond, and Garrison to Avon. Snow 2 or 3 inches deep on the ground.

11.40 p. m., 14 inches of snow at Blossburg sleet and rain.

COUNT 1.

This train, extra 1654, left Missoula for Helena about 11 p. m., May 1. (Record, p. 46.)

Engineer Gies testified that, starting from Missoula and going east, he came to the following stations in their order (Record, p. 25): Bearmouth, Drummond, Garrison, Avon. That he first noticed snow east of

Drummond; that it appeared heavy and wet; that the wires and poles were down in several places, due to the snow; that he never noticed a storm of that nature at that time of the year; that when he got to Avon, about 11 a. m. on the morning of May 2, there were about 8 or 9 inches of snow; that they went to Avon to wait for No. 3, a passenger train coming from Helena.

On cross-examination he testified (Record, p. 27) that he didn't notice any poles down until he got to Drummond and that he was not delayed materially by the storm up to the time he got to Drummond; that the snow was not sufficient to prevent the physical movement of the train; that they went on the sidetrack at Avon to wait for No. 3 to go by and that they got an order signed by the conductor of No. 3 to wait there for another train (extra west) (Record, p. 29); that he did not know whether the wire was working at Avon or not (Record, p. 30); that if they had not had to wait for this extra west they would have had time to go to the terminal, Helena, taking the engine and caboose and train crew, within the 16-hour period (Record, p. 29); that after this extra west arrived they did not then have time to go into Helena with the engine and caboose within the 16 hours (Record, p. 32), and accordingly the train was tied up and the crew, with the exception of the fireman, relieved.

Conductor Shaw's testimony was to the same effect. He further testified that when he left Garrison he had instructions from the dispatcher there

to the effect that if they found that they could not make Helena with the whole train within the 16 hours they were to take the engine and caboose and go on in. (Record, p. 34.) He did not see any poles or wires down at Avon and he didn't know the condition of the wires between Avon and Helena.

COUNT 2.

This train, extra 1633, left Missoula for Helena between 4 and 5 p. m. May 1 (Record, pp. 41, 45), or about six hours previous to the departure of the train involved in count 1.

Engineer Davis testified (Record, p. 38) that he first observed snow about Bearmouth the evening of the 1st; that they arrived at Elliston on the morning of May 2 about 7; that the snow there was half-way up to the knees and was very heavy and wet all along from Garrison to Elliston; that he never saw anything as bad at that time of the year; that when they got to Elliston they were tied up there on account of the 16-hour law, having been on duty over 15 hours; that they went into the siding there because their 16 hours was up and the crew went to bed, except the fireman, who watched the engine.

On cross-examination he testified that the reason they went off duty at Elliston was because they couldn't make Helena within the 16 hours; that the storm did not prevent them from proceeding to Helena. (Record, p. 41.)

The testimony of the remainder of the crew was to the same general effect.

Chief Dispatcher Thompson testified (Record, p. 44) that from between 11.40 p. m. May 1 and midnight the wires all went down east of Missoula. How far that condition existed he was unable to state. After the wires were down he made two attempts to communicate with these trains from Missoula, and after waiting an hour or two hours after midnight, after he saw that he could not get any communication east, he sent a message over foreign lines via Spokane, which was received at Helena and transmitted to Garrison. (Record, p. 46.) In the morning he went to Garrison on a passenger train, arriving there at 9.30, May 2, 2 hours and 50 minutes after they had received his message. When he arrived at Garrison at 9.30 a. m., May 2, there was no communication between Garrison and Helena. (Record, p. 47.) His purpose in sending the message was to advise the dispatcher at Garrison the time these crews should be released. (Record, p. 47.) It was impossible to control the movement of these two trains after they left Garrison on account of the wires. (Record, p. 48.) He arrived at Garrison before No. 1654 pulled out of Garrison. (Record, p. 49.) Never heard of a storm just exactly like it before. (Record, p. 50.) They have wet snow on the Coeur d'Alene and Lookout Mountain and in the Bitter Root Range, but for a heavy, wet snow in the spring he didn't think they had the wire troubles as bad as that was, because the wires there are those heavy wires, and they can

sustain more weight. In other words, they put up wires to meet that condition. (Record, p. 50.) The tonnage of extra 1654 was 2,249 tons—55 cars—and the tonnage of extra 1633 was 55 loaded cars—2,244 tons. The tonnage rating of both of these engines is 2,200 tons from Missoula to Garrison and 1,600 tons between Garrison and Elliston. Under the impression that the orders for the movement of the extra west from Helena were issued by the operator at Helena. Operator at Helena had no right to issue orders for that train. These orders were supposed to be issued from Missoula. If this operator had not sent this extra out of Helena, train 1654, with the engine and caboose, would have had ample time to reach Helena within the 16 hours. (Record, pp. 51–53.)

An “act of God” has been generally defined as something which occurs exclusively by the violence of nature; at least an act of nature which implies an entire exclusion of all human agencies.

In *Gleeson v. V. M. R. R. Co.* (140 U. S., 435, 439) Mr. Justice Lamar, delivering the opinion of the court, said:

It appears that the accident was caused by a landslide, which occurred in a cut some 15 or 20 feet deep. The defendant gave evidence tending to prove that rain had fallen on the afternoon of Friday and on the Saturday morning previous; and the claim is that the slide was produced by the loosening of the earth by the rain. We do not think

such an ordinary occurrence is embraced by the technical phrase "an act of God." There was no evidence that the rain was of extraordinary character, or that any extraordinary results followed it. It was a common, natural event; such as not only might have been foreseen as probable, but also must have been foreknown as certain to come. Against such an event it was the duty of the company to have guarded. Extraordinary floods, storms of unusual violence, sudden tempests, severe frosts, great droughts, lightnings, earthquakes, sudden deaths, and illnesses have been held to be "acts of God"; but we know of no instance in which a rain of not unusual violence and the probable results thereof, in softening the superficial earth, have been so considered.

In *The Majestic* (166 U. S., 375, 386; 17 S. Ct., 597; 41 L. Ed., 1039) it was held that the "act of God" which would exempt one from liability is an act in which no man has any agency whatever.

The snow was not sufficient to prevent the physical movement of the train, and the most that can be said of it is that it was an unusual storm for *that time of the year*. The wires should have been heavy enough to sustain the weight of the snow at all times of the year. Dispatcher Thompson testified (Record, p. 50) that on the Coeur d'Alene and Lookout Mountain and Bitter Root Range they do not have wire troubles as bad as that because they put up heavy wires to meet that very condition.

In the case of *Gleeson v. Virginia Midland R. R. Co.* (supra), the Supreme Court of the United States said:

To all intents and purposes a railroad track which runs through a cut where the banks are so near and so steep that the usual laws of gravity will bring upon the track the *débris* created by the common processes of nature, is overhung by those banks. Ordinary skill would enable the engineers to foresee the result, and ordinary prudence should lead the company to guard against it. To hold any other view would be to overbalance the priceless lives of the traveling public by a mere item of increased expense in the construction of railroads; and after all, an item, in the great number of cases, of no great moment.

It is submitted that the language and reasoning of this opinion apply with equal force to the facts in the case at bar.

The evidence fails to show any substantial delay due either to the snowstorm or to the wire failure. There is no substantial evidence as to where they were delayed or to what extent they were delayed.

Thompson testified that he sent a message from Missoula to Garrison which was received at Helena and sent from there to Garrison, being received at Garrison 2 hours and 50 minutes before he arrived there. As he arrived there at 9.30 a. m. May 2, the wires must have been open between Helena and Garrison at 6.40 a. m. As extra 1633 arrived at Elliston and tied up at 7 a. m. May 2, it could not

have been materially delayed on account of the wires being down between Garrison and Helena.

Furthermore, both of these train crews knew the time they went on duty and when their 16 hours were up, and they had standing instructions that when they were unable to communicate with the dispatcher on account of wire failure or other cause they were to take the matter in their own hands and tie up at the first available point to prevent a violation of the law. (Record, p. 58.) As a matter of fact, both of these crews did tie up, and but for the fact that the firemen were required to watch the engines no service of any kind in excess of 16 hours would have occurred.

Both of these trains were loaded in excess of the maximum tonnage, and it may well have been that their movement was more or less impeded by this fact.

Thompson testified that it was impossible to control the movement of these two trains after they left Garrison on account of the wires. (Record, p. 48.) He further testified that he arrived at Garrison before extra 1654 pulled out of there and that he gave them instructions there. This was at 9.30 on the morning of May 2; this train had left Missoula at 11 p. m. the night before. The crew went on duty at 10 p. m., so that before leaving Garrison they had been on duty 11 hours and 30 minutes. From Missoula to Helena it is 119 miles; from Missoula to Garrison it is 68 miles; so that they had but 4 hours and 30 minutes to complete the remaining 51 miles.

At Garrison they maintained four or five train crews, and they also have helper crews and engines there. (Record, p. 31.)

Before this train, extra 1654, left Garrison, Thompson knew of the storm; he knew that the wires were down between Missoula and Garrison; he knew that there was no communication between Garrison and Helena; he knew that this train was loaded in excess of the maximum tonnage; he knew how long the crew had already been on duty; he knew that it would be impossible to control the movement of this train after it left Garrison on account of the wires, and yet, notwithstanding all these, he allowed this train to proceed toward Helena.

The evidence fails to show that any attempt was made to reduce the tonnage of this train at Garrison or that any effort was made to utilize the crews there.

Even after this train had left Garrison, and after it arrived at the station of Avon, they still had time to take the engine and caboose and go on into Helena with the crew in accordance with instructions they had received from the dispatcher at Garrison, and they would have done so if they had not received an order to wait there until an extra west arrived from Helena. Thompson testified that the order for the movement of this extra west out of Helena was issued by the operator who had no right to issue the order, but took it upon himself to do so.

The operator knew the condition of the wires; knew that the trains in question were out on the road; knew the time of 16 hours was up. (For the

message which Thompson sent from Missoula to Garrison was received at Helena and transmitted from there to Garrison.) (Record, p. 46.)

The act provides that in all prosecutions the common carrier shall be deemed to have knowledge of all the acts of all its officers and agents. The delays were therefore the result of causes known unto the carrier and which could have been foreseen.

The purpose and object of the statute was well described in the unanimous opinion of the Court of Appeals of Kentucky (140 S. W. Rep., 672), *St. Louis, I. M. & S. R. Co. v. McWhirter*:

Its aim is the protection of the lives of employees of the railroad companies, and also the lives and property entrusted to the railroads as common carriers. It recognizes that there is a limit to human endurance, and that hours of rest and recreation * * * are needful to the health and safety of the men engaged in the hazardous work of railroading, and that the benefit it is intended to confer will better enable them to serve their employers and promote the ends of commerce. The application of the provision of the statute may sometimes bear harshly upon an offending railroad company, but on the whole their just enforcement, in all proper cases, is found to be promotive of the public welfare.

See also the case of *United States v. Chicago, Milwaukee & P. S. Ry. Co.*, eastern district of Washington (197 Fed., 624), in which the court says:

The purpose of the statute, as indicated by its title, is to promote the safety of employees

and travelers upon railroads by limiting the hours of labor of those who are in control of dangerous agencies, lest by excessive periods of duty they become fatigued and indifferent and cause accidents leading to injuries and destruction of lives. (*N. Y. v. Erie R. Co.*, 198 N. Y., 369.) And while the statute is penal in its nature, it is in some aspects remedial and should be so construed to promote the apparent policy and object of the legislature and not entirely defeat its purpose. (*Johnson v. Southern Pac. Co.*, 196 U. S., 1.)

In view of the purpose of this statute to protect human life, a construction ought not to be permitted which would make the negligence of a railroad company and lack of care in operation and in the maintenance of its instrumentalities a license to work its employees beyond the limits established by the Congress in the interest of the safety of travelers and employees. Any cause to which the negligence of the railroad company in any manner contributes ought not to be allowed as an excuse for violation of the terms of this act. Where the negligent act of the carrier, or of its officers, agents, or employees, in the conduct and management of its business, either in the maintenance of its instrumentalities or in compliance with time schedules, results in a delay to a train crew there should be no suspension of the wholesome and reasonable obligation of the act.

The reasoning of the court in the case of *Newport News & Mississippi Valley Co. v. United States* (61 Fed., 488) is particularly applicable to the facts in

the case at bar. Lurton, circuit judge, delivering the opinion of the court, said:

The contention of counsel for appellant is that the excuse for overconfinement specified in the act, "storm," is one of a class within what the law regards as an "act of God," against which a common carrier does not insure, and that Congress has to that class added another of a different character, described as "other accidental causes"; that the use of the disjunctive "or" after "storm" indicates a purpose to except detentions due to causes not the act of God, and described by the term "accidental"; that this construction finds support in section 4388, which imposes the penalty only upon such carriers as "knowingly and willfully" fail to comply with the requirements.

This reasoning, while plausible, is not satisfactory. To yield to it would emasculate a statute having a most humane object in view. Congress did not mean that simply because the carrier had encountered a storm therefore he should be excused.

It must appear that the storm "prevented" obedience. The storm could not be prevented. Its consequences may be avoided or mitigated by the exercise of diligence. If, with all reasonable exertion, a carrier is unable by reason of a storm to comply with the law, then he has been unavoidably "prevented" from obeying the law. If, notwithstanding the storm, he could by due care have complied with the law, then he is at fault, because "his own negligence is the last link in the chain of

cause and effect, and in law the proximate cause" of the failure to comply with the law. Therefore, to avail himself of the excuse of "storm," the carrier must show not only the fact of a storm, but that with due care he was "prevented," as an unavoidable result of the storm, from complying with the law. We can reach but one conclusion as to the meaning of Congress by the expression "other accidental causes." * * *

An effect attributable to the negligence of the appellant is not an unavoidable cause. The negligence of the carrier was the cause; the unlawful confinement and unreasonable detention but an effect of that negligence.

In construing this proviso to the hours-of-service act, the Circuit Court of Appeals for the Eighth Circuit, in the case of *United States v. Kansas City Southern Ry. Co.* (202 Fed., 828), said:

The act under consideration does not employ the words knowingly and willfully. The carrier is made liable if it requires or permits any employee to be or remain on duty in violation of stated provisions. This case then falls within that class where purposely doing a thing prohibited by statute may amount to an offense, although the act does not involve turpitude or moral wrong. (*Armour Packing Co. v. United States* (C. C. A.), 153 Fed., 1; same case, 209 U. S., 56; *Chicago, St. P., M. & O. Ry. Co. v. United States* (C. C. A.), 162 Fed., 835.) By the terms of the proviso the carrier is excused "where the delay is the result of a cause not known * * * at the

time said employee left a terminal, and which could not have been foreseen." Not merely which was not foreseen, but which could not have been foreseen. The phrase "by the exercise of due diligence and foresight" is not present. Counsel argue that by leaving out this phrase Congress intended to limit the liability of the carrier; that it meant to imply that what was not actually foreknown could not, in contemplation of this law, have been foreseen. We can not assent to this interpretation. Clearly Congress did not intend to relieve the carrier from responsibility in guarding against delays in a matter deemed to be of such importance. By this act it sought to prevent railroad employees from working consecutively longer than the period prescribed, as completely and effectively as could be accomplished by legislation. To bring itself within the exceptions stated, the carrier must be held to as high a degree of diligence and foresight as may be consistent with the object aimed at and the practical operation of its railroad. Conformably to this view, it has been uniformly held by the courts that ordinarily delays in starting trains by reason of the fact that another train is late; from sidetracking to give superior trains the right of way, if the meeting of such trains could have been anticipated at the time of leaving the starting point; from getting out of steam or cleaning fires; from defects in equipment; from switching; from time taken for meals; and, in short, from all the usual causes incidental to operation are not, standing

alone, valid excuses within the meaning of this proviso. The carrier must go still further and show that such delays could not have been foreseen and prevented by exercise of the high degree of diligence demanded.

The terms "casualty," "unavoidable accident," "act of God," "and causes which could not have been foreseen," all indicate an intention on the part of Congress to require the railroad to comply with the provisions of the law under all the circumstances which can be regarded as reasonably within its control.

The proviso relieves the railroads of the penalties only in cases where there has been no failure on the part of the railroad to guard against the delay. Where the delay is the result of a cause within the control of the carrier and is avoidable and could have been foreseen, it should have been foreseen as an ordinary incident of railroading. It is submitted that such a cause does not relieve the carrier from the penalties of the act which was intended in good faith to limit the employment of men in train service.

III.

Did the court below err in directing a verdict for the plaintiff?

In conclusion, we desire to call attention to the following settled rule of law:

Where each party has moved for a directed verdict, the finding of the court can not be disturbed if there was any substantial evidence to support it, but

the appellate court is limited to the consideration of the correctness of the finding on the law.

We quote from *Beuttell v. Magone* (157 U. S., 154):

Both parties asked the court to instruct a verdict; both affirmed that there was no disputed question of fact which could operate to deflect or control the question of law. This was necessarily a request that the court find the facts, and the parties are therefore concluded by the finding made by the court, upon which the resulting instruction of law was given. The facts having been thus submitted to the court, we are limited in reviewing its action to the consideration of the correctness of the finding on the law, and must affirm if there be any evidence in support thereof. (*Cases cited.*)

See also *Phenix Ins. Co. v. Kerr* (129 Fed., 723), and cases there cited.

In reviewing a similar case to the one at bar, where the defendant sought to bring itself within the proviso to the hours-of-service act and where, both parties having requested a directed verdict, the court below directed a verdict for the Government, the Supreme Court of the United States in the case of *Missouri, Kansas & Texas Ry. Co. of Texas v. United States* (231 U. S., 112) said:

It is urged that in one case the delay was the result of a cause—a defective injector—that was not known to the carrier and could not have been foreseen when the employees left a terminal, and that therefore by the proviso in section 3 the act does not apply. But

the question was raised only by a request to direct a verdict for the defendant, and the trouble might have been found to be due to the scarcity and bad quality of the water, which was well known. (See *Gleeson v. Virginia Midland Ry. Co.*, 140 U. S., 435; *The Majestic*, 166 U. S., 375, 386.)

Wherefore it is respectfully submitted that there was no error in the ruling of the court below, and the judgment should be affirmed.

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